No.

83-125

IN THE

Supreme Court of the United States

October Term, 1983

PENNTECH PAPERS, INC. and
T.P. PROPERTY CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 25, 1983

Question Presented

Do the parent corporations Penntech Papers, Inc. and T.P. Property Corporation have a duty to bargain under Section 8 of the National Labor Relations Act, as amended by the Labor Management Relations Act, 29 U.S.C. § 158, with the employees of their subsidiary Kennebec River Pulp and Paper Company ("Kennebec") when they have been found in a parallel proceeding to be separate corporations not responsible for the obligations of Kennebec under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185?

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Petitioners Penntech Papers, Inc. and T.P. Property Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on April 26, 1983.

Opinions Below

The opinion and judgment of the Court of Appeals for the First Circuit, which is reported at 706 F.2d 18 (1st Cir. 1983), and the opinion of the National Labor Relations Board, which is reported at 263 NLRB No. 33 (1982), are reprinted in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on April 26, 1983.* This petition for certiorari is being filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 29:

§ 158 Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

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* Petitioners Penntech Papers, Inc. and T.P. Property Corporation as well as Kennebec River Pulp and Paper Company were petitioners in that action. The National Labor Relations Board was respondent. The unions representing Kennebec's employees—United Paperworkers International Union and its Locals 36 and 73, International Brotherhood of Firemen & Oilers and its Local 270, International Brotherhood of Machinists & Aerospace Workers and its Local 559 and District No. 99, International Association of Machinists & Aerospace Workers—were intervenors.

§ 185 Suits By and Against Labor Organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Statement of the Case

Kennebec River Pulp and Paper Company ("Kennebec") is a Maine corporation which owns a paper mill in Madison, Maine. In December 1975 Kennebec discontinued its operations, which had been unprofitable for several years, laid off its employees and closed the mill (JA 150).* On March 3, 1976, T.P. Property Corporation ("TP"), a wholly-owned subsidiary of Penntech Papers, Inc. ("Penntech"), purchased all of the outstanding stock of Kennebec from the Southeastern Capital Corporation with the intention of providing necessary capital to permit Kennebec to start the mill again in the hope of making it a profitable operation (JA 150). The mill, however, remained unprofitable. In fact, Kennebec lost approximately $3,000,000 in 1976 (JA 156).

On November 19, 1976, the unions representing Kennebec's employees ("Unions") and department heads were informed that unless production increased to a least 120 saleable tons per day, the mill would have to be shut down (JA 70). Production did not reach this level, as the employees were aware (JA 70). In fact, during the first two months of 1977, Kennebec lost three quarters of a million dollars despite increased production efforts (JA 156). As a result of these losses and the failure to improve production, Kennebec closed the mill on March 29, 1977 (JA 157).

Kennebec and the Unions had been parties to a collective bargaining agreement ("Kennebec Agreement") since at

* References to the record before the lower court shall be referred to as "JA ——". References to the appendix attached hereto shall be referred to as "——a".

least 1961 (JA 153). They had last negotiated an agreement in 1976, before TP acquired the Kennebec stock. On April 7, 1977, while collective negotiations were proceeding between the Unions and Kennebec, the Unions filed a demand for arbitration against Kennebec, alleging that Kennebec had failed to pay wages, severance pay, vacation pay, pensions, insurance and other fringe benefits allegedly owing under the Kennebec Agreement as a result of the March 29, 1977 shutdown (JA 132). Kennebec agreed to immediate arbitration of the dispute. The Unions instead brought an action based on the Kennebec Agreement against Penntech and TP, as well as Kennebec, for these claims under Section 301 of the Labor Management Relations Act ("Act"), 29 U.S.C. § 185, in the United States District Court for the District of Maine, and in that action moved to compel arbitration against Penntech and TP as well as Kennebec (JA 134). The Unions also, on April 11, 1977, filed with the National Labor Relations Board ("NLRB") an unfair labor practice charge against Kennebec, alleging that it had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5), by refusing to bargain collectively over the effects of the mill shutdown (JA 202-03).

On October 21, 1977, the district court in the Section 301 suit found that Penntech and TP were not the alter egos of, nor successors to, Kennebec, but separate corporate entities, and, therefore, were not liable for Kennebec's obligations under the Kennebec Agreement. Accordingly, the district court denied the Unions' motion to compel arbitra-

tion. *United Paperworkers Int'l Union* v. *Penntech Papers, Inc.*, 439 F. Supp. 610 (D. Me. 1977).*

After the district court denied their motion to compel arbitration against Penntech and TP, the Unions amended their unfair labor practice charge to add Penntech and TP as respondents. The NLRB permitted this amendment lthough the six months limitations period had expired (JA 204). 29 U.S.C. § 160(b). The Unions sought thereby to compel Penntech and TP to bargain with them over the identical issues they had sought to arbitrate in their unsuccessful Section 301 action.

On January 23, 1979, despite the decision of the district court in the Section 301 action, which had by this time been affirmed by the Court of Appeals for the First Circuit, the NLRB Regional Director issued a complaint alleging that Penntech, TP and Kennebec were a single employer and that they had failed to bargain in good faith over the effects of the shutdown of the Kennebec mill in violation of Sections 8(a)(1) and (5) of the Act (JA 205).

On January 21, 1981, an NLRB Administrative Law Judge found that Penntech, TP and Kennebec constituted a single employer and had failed to bargain with the Unions

* The Court of Appeals for the First Circuit affirmed in 1978, *United Paperworkers Int'l Union* v. *T.P. Property Corp.*, 583 F.2d 33 (1st Cir.), saying

> an order to Penntech to arbitrate with the union could only be based on a policy that a holding parent corporation should be bound to the arbitration agreement of its subsidiary whenever it controls its subsidiary's stock and participates in its management. No such policy has yet been adopted by Congress or the courts.

583 F.2d at 35-36. Thereafter, the Unions withdrew their complaint with prejudice (JA 193-99).

over the decision to close the mill, and over the effects of that closure (JA 63).

On August 9, 1982, the NLRB affirmed so much of the Administrative Law Judge's decision as found that Penntech, TP and Kennebec were a single employer and had failed to bargain with the Unions regarding the effects of closure in violation of Sections 8(a)(1) and (5) of the Act and ordered Petitioners to bargain collectively with the Unions regarding the effects of closure and to pay Kennebec's former employees backpay (19a). The NLRB expressly declined to be bound by the prior decision of the Court of Appeals which held that Penntech, TP and Kennebec were legally separate corporate entities (21a-22a).*

On April 26, 1983, the Court of Appeals affirmed the NLRB decision and granted enforcement of the NLRB's Order,** holding that the NLRB was not foreclosed by the decisions of the courts in the Section 301 action from finding under Sections 8(a)(1) and (5) of the same statute that TP, Penntech and Kennebec are a single employer and there was substantial evidence to support the NLRB's findings that TP, Penntech and Kennebec are a single employer and that they had failed to bargain with the Unions over the effects of the shutdown of Kennebec's mill (1a).

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* The NLRB overturned that portion of the Administrative Law Judge's decision which held that Penntech, TP and Kennebec had failed to bargain about the decision to close the mill (23a).

** Review of the NLRB's decision was sought pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f).

Reasons for Granting the Writ

I. The Decision Below Raises Significant Questions Concerning the Interpretation of the Labor Management Relations Act

The effect of the decisions in the instant case are to hold that, for purposes of Sections 8(a)(1) and (5) of the Act, Penntech and TP do not have a separate identity from their subsidiary Kennebec, and are therefore liable for conduct of Kennebec, although no misconduct on their part has been found or is claimed, and that they have an obligation to bargain with the Unions representing Kennebec's employees over the effects of the shutdown of Kennebec's mill simply because they own its stock and their employees had a role in its management.* This is precisely what the courts had held in the Section 301 action brought by the same Unions could not be used to predicate liability on the part of Penntech and TP absent proof of some conduct on their part, such as fraud.

Whether a parent corporation has a duty to bargain with the employees of its wholly-owned subsidiary over issues it is not obligated to arbitrate, is a question of first impression for this Court. Decisions involving the duty of employers who have not signed a collective bargaining agreement to bargain and to arbitrate have arisen only in successorship cases, not, as here, in a parent-subsidiary situation. So far as we are aware, no case has been presented

* The finding of the Administrative Law Judge, affirmed by the Court of Appeals, that Kennebec, TP and Penntech are a single employer is not supported by substantial evidence on the record as a whole nor is it consistent with established Board precedent and case law. *See Radio & Television Broadcast Technicians Local 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965).

where a duty to bargain has been imposed on a parent corporation with regard to its subsidiary's employees. As the Court of Appeals recognized by its decision in the Section 301 suit, the implications of such a decision which overturns long-established principles of corporate separateness that are fundamental to the organization of American business, are serious and troubling. At very least, it will discourage a prospering corporation from even considering undertaking the sort of rescue operation Penntech and TP embarked on here and, at the same time, it would bestow on the Unions rights they neither bargained for nor had any basis to expect.

There is no indication in the legislative history of the Act that Congress intended that the development of labor law under Sections 8(a)(1) and (5) would be oblivious to basic principles of corporate law. To the contrary, since the principle of corporate separation is central to the creation and maintenance of jobs in risk situations, there is every reason to apply that principle similarly in construing all provisions of the Act, unless otherwise expressly directed by Congress. As the Court of Appeals observed in the Section 301 suit, there is no successorship issue here. Rather, the common issue is one of the responsibilities of a parent for the acts and obligations of its subsidiaries, an issue upon which the law has been well settled for several hundred years.

Furthermore, the decision of the Court of Appeals makes a parent corporation's obligations with regard to its subsidiary dependent on the forum. This result is contrary to the principle that the policies underlying Section 301

and Sections 8(a)(1) and (5) are the same. *Local 174, International Bhd. of Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957). If the policies underlying these sections are the same then there is no reason for a parent corporation to be more responsible for the actions of its subsidiary when it is before the NLRB pursuant to Sections 8(a)(1) and (5) than when it is before the court pursuant to Section 301.

The decision also gives unions two "bites at the apple". In this case, the Unions first tried unsuccessfully to compel Penntech and TP to take responsibility for the Kennebec Agreement and to arbitrate over the benefits they were allegedly entitled to as a result of the shutdown. Disappointed over the result in the Section 301 suit, they tried to obtain the same result through the NLRB.

The decision of the Court of Appeals impermissibly and unjustifiably fragments the labor law and gives to employees rights which were not contemplated by Congress or at common law. No public policy is served by requiring a parent corporation to bargain on behalf of an existing subsidiary corporation over subjects for which the parent has no direct obligation. The Court of Appeals' decision will have the deleterious effect of discouraging individuals and corporations from investing in and hopefully saving foundering businesses.

II. The Decision Below Conflicts With This Court's Principle That Section 301 of the Labor Management Relations Act Bespeaks the Same Policies as Section 8

This Court has consistently concluded that the same policies that underlie Sections 8(a)(1) and (5) apply as well to Section 301. *See Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964).* In the successorship context this Court has said,

> It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims.

Howard Johnson Co. v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974). It is axiomatic that if the same policies apply to actions brought pursuant to Sections 8(a)(1) and (5) and Section 301 there is no policy justification for imposing on parent corporations different obligations depending on whether an action is brought pursuant to Sections 8(a)(1) and (5) as opposed to Section 301.

Only recently, the Court strongly reaffirmed the importance of imposing consistent obligations upon employers and unions in fulfilling their duties under Sections 301 and

* *NLRB* v. *Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972), is not to the contrary. In that case the Court held that a successor employer had a duty to bargain with the union representing the employees of the predecessor employer. Burns voluntarily became the direct employer of the predecessor's employees whom the union had a right to represent. No issue of corporate separation was involved.

8 of the Act. In *DelCostello* v. *International Bhd. of Teamsters*, 51 U.S.L.W. 4693 (U.S. June 8, 1983), this Court found that there is a "similarity of rights" asserted in Section 301 suits and unfair labor practice actions and a "close similarity of the considerations relevant" to the choice "of a statute of limitations period applicable to the two proceedings." 51 U.S.L.W. at 4698. Thus, this Court held that the same single statute of limitations—not two different limitation periods—should apply to both unfair labor practice and Section 301 actions despite the different forums involved.

The decision of the Court of Appeals in this case when read against its decision in the Section 301 suit shows that it has diverged from this Court's enduring principle of interpreting the Labor Management Relations Act as a unified body of law, which has been carefully followed in other circuits. For example, the Court of Appeals for the Fifth Circuit has consistently held that the same standards apply to determine an employer's liability under Section 301 and Sections 8(a)(1) and (5). *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *reh'g denied*, 696 F.2d 996 (5th Cir. 1983). In that case, the court wrote,

> [W]e think that it would be inconsistent with the congressional mandate to fashion the law under section 301 from the policy of our national labor laws to say that the policies found controlling in the unfair labor practice context . . . may be disregarded by the district court in the present suit under section 301 and thus to permit the rights and obligations of the parties to vary with the forum.

690 F.2d at 513. *See also Florida Marble Polishers Health & Welfare Trust Fund* v. *Edwin M. Green, Inc.*, 653 F.2d

972 (5th Cir. 1981); *Tishman Construction Corp.* v. *International Union of Elevator Constructors Local No. 1*, 92 L.R.R.M. 2705 (S.D.N.Y. 1976).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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July 25, 1983

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1635

PENNTECH PAPERS, INC., T.P. PROPERTY CORPORATION, and KENNEBEC RIVER PULP AND PAPER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNITED PAPERWORKERS INTERNATIONAL UNION, ET AL.,
Intervenors.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

Campbell and Bownes, *Circuit Judges,*
and Maletz,* *Senior Judge.*

John W. Ohlweiler, with whom *Terri M. Solomon, Gary I. Horowitz, Simpson Thacher & Bartlett, Sidney St. F. Thaxter, II,* and *Thaxter Lipez Stevens Broder & Micoleau* were on brief, for petitioners.

* Of the United States Court of International Trade, sitting by designation.

David S. Fishback, Attorney, National Labor Relations Board, with whom *William A. Lubbers,* General Counsel, *John E. Higgins, Jr.,* Deputy General Counsel, *Robert E. Allen,* Associate General Counsel, *Elliott Moore,* Deputy Associate General Counsel, and *Andrew F. Tranovich,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Benjamin Wyle, for intervenors.

April 26, 1983

MALETZ, *Senior Judge.* Penntech Papers, Inc. (Penntech) and its two subsidiary companies, T.P. Property Corporation (T.P.) and Kennebec River Pulp and Paper Company (Kennebec), petition this court to review and set aside an order of the National Labor Relations Board (the Board) which found that they had failed to bargain in good faith over the effects of a decision to close Kennebec. The Board cross-applies for enforcement of its order. Incident to the alleged failure to bargain is the Board's determination that Penntech, T.P. and Kennebec are a single employer within the meaning of section 2(2) of the National Labor Relations Act (the Act) 29 U.S.C. § 152(2) (1976). In resolving this latter question the court must examine what effect *United Paperworkers International Union* v. *Penntech Papers, Inc.,* 439 F. Supp. 610 (D. Me. 1977), *aff'd sub nom. United Paperworkers International Union* v. *T.P. Property Corp.,* 583 F.2d 33 (1st Cir. 1978), has on the single employer determination.

For the reasons that follow, the petition for review is denied and enforcement of the Board's order is granted.

Opinion of the Court of Appeals

I

Background

Penntech is a Delaware corporation having its corporate offices in New York City and operating a paper mill in Johnsonburg, Pennsylvania. From 1975 to 1977 Penntech had five directors, including John Leslie and Merrill J. "Jack" Dodge, who were also Penntech's president and vice president for marketing, respectively. The other officers of Penntech included William B. Ford, vice president for finance and secretary; Stephen D. Weinroth, vice president for corporate development; Steven D. Bittel, controller; and Georgie A. Penrose, treasurer.

In May 1975, T.P. was organized and incorporated by Penntech as a wholly-owned subsidiary for the purpose of acquiring certain real estate in Johnsonburg, an acquisition which was never consummated. T.P. performed no other corporate functions until March 1976 when it purchased the outstanding capital stock of Kennebec. The directors of T.P. were Leslie, Ford, and Weinroth. These three individuals also served as T.P.'s president, vice president, and vice president/secretary, respectively. Penntech's treasurer, Penrose, also served as T.P.'s treasurer. T.P. shared corporate headquarters with Penntech, but had no separate space at the headquarters, no furniture, and no employees of its own.

Kennebec is a Maine corporation which in 1959 acquired a paper mill in Madison, Maine as its only operating facility. Following years of declining profits, Kennebec discontinued its operations on December 20, 1975, laid off its employees, and closed its mill. Approximately three months later, on March 3, 1976, T.P. purchased all Kennebec's stock. As a condition precedent to the stock purchase, Penntech required Kennebec to negotiate certain changes in the collective bargaining agreement between Kennebec and the unions representing the mill employees. An amended

collective bargaining agreement was signed by Kennebec and the unions on March 1, 1976.

With T.P.'s stock acquisition several of Penntech's officers and directors were appointed to serve concurrently as Kennebec officers and directors. Thus, Leslie and Ford were named as two of Kennebec's three new directors. (As of February 1977 Kennebec's board of directors consisted solely of Leslie and Ford.) Kennebec's new officers included Allen J. Nadeau, a Penntech vice president, as president;[1] Ford as vice president, secretary and treasurer; and Bittel as corporate controller. Weinroth was later added as a Kennebec vice president.

Kennebec resumed operations under its new ownership and management within a few weeks after T.P.'s stock purchase. Unfortunately, the Kennebec mill continued to be unprofitable, losing some $3,000,000 in 1976. Given this situation on November 19, 1976 Leslie called a meeting at the Kennebec mill attended by union representatives and Kennebec's department heads. At that meeting Leslie announced that unless production increased to specified levels the mill could not remain viable, adding that he would not allow Kennebec to pull Penntech down with it. With this announcement Leslie terminated the meeting. The union representatives were not given an opportunity to respond. Production did increase for a short time, but thereafter slipped into steady decline.

In January and February 1977, Kennebec lost approximately $750,000. By this time it had become obvious to at least one highly-placed company official, William B. Ford, Penntech's vice president for finance and a Kennebec director, that there would be large losses in March 1977 as well. In January and February Ford was further convinced that production would never reach the required level

1. Bruce St. Ledger eventually replaced Nadeau as Kennebec's president.

and communicated these views "to everyone in management in both companies." After an operations report in February 1977, Ford concluded that "a number of the steps we had taken were not being successful" and that Kennebec would not operate profitably in the future.

On March 29, 1977 the Kennebec mill was closed. Until that date the companies never notified the unions that the Kennebec mill would discontinue operations. On that day Kennebec's president, Bruce St. Ledger, having been directed by Leslie to close the mill, held a meeting with the union representatives at approximately 1:30 p.m. informing them for the first time that the mill would be shut down and that the employees should empty their lockers and remove their tools from the mill by 3:00 p.m. that same day. A letter was sent on March 30, 1977 formally advising the unions of the mill shutdown.

Five days later, on April 4, St. Ledger, who had consulted with Leslie and Penntech's attorneys on whether to label the layoff "indefinite" or "permanent," informed the union representatives that the layoff would be "indefinite." He advised them that there was a possibility that Kennebec would resume operations and that therefore the employees would not be entitled to severance pay. He was unable to provide definitive answers to the union representatives' questions concerning insurance and pension payments, and told the union representatives that if they wanted authoritative answers they should speak to Penntech's attorneys. He then gave them counsels' name and telephone number in New York City.

On April 11, 1977 the unions filed an unfair labor practice charge with the Board alleging that Kennebec had violated section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158 (a)(5) and (1), by "terminating its operations without adequate notice or collective bargaining with the employees' representatives over the effect of the termination upon

the employees." The unions also requested arbitration of a grievance relating to the employees' entitlement to vacations, pensions, and severance pay under the collective bargaining agreement. This request led to litigation by the unions seeking to compel Penntech and T.P. to arbitrate the alleged contract violations. On appeal from a dismissal of the unions' action this court held that since Penntech and T.P. were not signatories to the collective bargaining agreement, they could not be compelled to arbitrate. *United Paperworkers International Union* v. *T.P. Property Corp.*, 583 F.2d at 35-6.

St. Ledger and the union representatives met for the last time on April 22, 1977. At this meeting St. Ledger stated that he was now speaking for Penntech which gave him his orders. He answered some of the unions' questions concerning vacations, insurance and pensions. However, he adhered to his earlier position that the mill employees were laid off indefinitely and not terminated permanently. In response to union inquiries as to whether Kennebec was closed permanently, St. Ledger stated that Penntech was in touch with "people in the hope to start up the mill." There were no further meetings between Kennebec and the unions. Following foreclosure Kennebec never reopened the mill.

On January 23, 1979, the Board's Regional Director issued a consolidated complaint charging that Penntech, T.P. and Kennebec (the companies), as a single employer, violated section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the unions regarding the effects of the companies' decision to close the Kennebec mill.

The case was tried before an administrative law judge (ALJ) at a seven-day hearing. On January 21, 1981, the ALJ issued his decision and remedial order finding the companies to be a single employer and guilty of refusing

to bargain in good faith with the unions over the effects of the mill closing. On August 9, 1982, a three member panel of the Board affirmed the ALJ's findings, conclusions and order, with some minor modifications. 263 N.L.R.B. No. 33. This petition for review and cross-application for enforcement followed.

II

Standard of Review

The court must enforce the Board's order if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole. *NLRB* v. *Cable Vision, Inc.*, 660 F.2d 1, 3 (1st Cir. 1981); *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981); 29 U.S.C. § 160(e) (1976). As interpreted by the Supreme Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), " '[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 477. In searching the entire record for substantial evidence, a reviewing court "must take into account whatever in the record fairly detracts" from the Board's fact finding as well as evidence that supports it. *Id.* at 487-88. The court may not substitute its judgment for that of the Board when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*," and must defer to the Board's inferences in the Board's areas of specialized experience and expertise. *Id.* at 488. However, it is appropriate to set aside the Board's decision when the court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the

record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Id.* at 488. As to whether a party has bargained in good faith—a mixed question of law and fact—the court must sustain the Board's conclusions if reasonable. *See, e.g., Famet, Inc.* v. *NLRB,* 490 F.2d 293, 295 (9th Cir. 1973); *NLRB* v. *Marcus Trucking Co.,* 286 F.2d 583, 592 (2d Cir. 1961).

Before turning to a review of the Board's findings of fact and conclusions of law, the court addresses the companies' contention that the Board was collaterally estopped from finding a single employer relationship in light of *United Paperworkers International Union* v. *Penntech Papers, Inc.,* 439 F. Supp. 610 (D. Me. 1977), *aff'd sub nom. United Paperworkers International Union* v. *T.P. Property Corp.,* 538 F.2d 33 (1978).

III

Collateral Estoppel

In *Penntech Papers,* the unions brought an action, pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976),[2] to compel Penntech and T.P. to arbitrate certain grievances arising out of alleged violations of the collective bargaining agreement between Kennebec and the unions. The basic issue was whether Penntech, as a nonsignatory to that agreement, could be compelled to arbitrate.

2. That section provides in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

While noting the extremely close relationship of the companies, the district court nevertheless concluded that under an alter ego analysis Kennebec was not Penntech's alter ego, there being no showing of any illegal motive or intent to avoid Kennebec's contractual obligations to the unions. Accordingly, the fact that Penntech was the parent of Kennebec, standing alone, was insufficient to bind the former to the latter's obligation to arbitrate with the unions. *Id.*, 439 F. Supp. at 621.

In affirming the district court, this court concluded that even though Penntech controlled Kennebec's stock and participated in its management, this, without more, was insufficient to bind Penntech, a nonsignatory, to the terms of Kennebec's collective bargaining agreement. *T.P. Property Corp.*, 583 F.2d at 36.

The companies argue that under the doctrine of collateral estoppel this court's determination in *T.P. Property Corp.* precludes the Board from finding that the three companies are a single employer. It is true that courts have invoked collateral estoppel to preclude the Board from resolving an issue in a manner which is antithetical to a prior resolution of the identical issue by a district court. *See, e.g., NLRB* v. *Heyman*, 541 F.2d 796 (9th Cir. 1976). But before collateral estoppel may be successfully raised there must be at a minimum an identity of issues in the two actions. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876); *International Wire* v. *Local 38, International Brotherhood of Electrical Workers*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973). If the issue which was adjudicated in the earlier proceeding differs significantly from the issue presented in the later proceeding, collateral estopel is not applicable. *Metropolitan District Council* v. *J.E. Hoetger & Co.*, 672 F.2d 580, 583 (6th Cir. 1982).

Here, the issue presented in the section 301 action is significantly different from the issue presented in the section 8(a)(5) proceeding. In the section 301 action the basic question presented was whether Penntech was the alter ego of Kennebec. In the section 8(a)(5) proceeding the question was whether the companies constituted a single employer. The Board's decisions have made it clear that these two questions are conceptually distinct. *See, e.g., Hageman Underground Construction,* 253 N.L.R.B. 60, 60 n. 2 (1980); *Naccarato Construction Co.,* 233 N.L.R.B. 1394, 1398-99 (1977). The focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets. *Carpenters Local 1846* v. *Pratt-Farnsworth, Inc.,* 690 F.2d 489, 508 (5th Cir. 1982). Unlawful motive or intent are critical inquiries in an alter ego analysis, inquiries which are wholly absent in a single employer analysis. *NLRB* v. *Tricor Products, Inc.,* 636 F.2d 266, 270 (10th Cir. 1980) (motivation by anti-union animus a relevant factor in alter ego analysis). *See also* Note, *Bargaining Obligations After Corporate Transformations,* 54 N.Y.U.L. Rev. 624, 638 (1979) ("while a single employer examination is essentially objective, the employer's motivation for the business change is an important element of the alter ego analysis.") It is the alter ego finding which will bind a nonsignatory to a collective bargaining agreement, not a finding of single employer status. *Naccarato Construction Co.,* 233 N.L.R.B. at 1398-99. *See Local 59, International Brotherhood of Electrical Workers* v. *Namco Electric, Inc.,* 653 F.2d 143, 147 (5th Cir. 1981); *UAW* v. *Cardwell Mfg. Co.,* 416 F. Supp. 1267, 1283 (D. Kan. 1976); *Plumbers Local 519* v. *Service Plumbing Co., Inc.,* 401 F. Supp. 1008, 1013 (S.D. Fla. 1975). *See also Pratt-Farnsworth, Inc.,* 690 F.2d at

510 & n. 10 (alter ego analysis is appropriate in section 301 actions).[3]

In sum, "[w]hether two firms are a single employer for collective bargaining purposes and whether a single contract is binding on two separate corporations are not only different questions, but they may have different answers." *Namco Electric, Inc.*, 653 F.2d at 147. Given the difference in legal issues presented in the section 301 action from those in the section 8(a)(5) unfair labor practice proceeding, collateral estoppel is not applicable.

Having thus concluded, we now turn to a consideration of the Board's single employer determination.

IV

Single Employer Status

The Board's finding of an unfair labor practice by the companies is premised on its conclusion that Penntech, T.P. and Kennebec constitute a single employer within the mean-

3. We find additional support for our conclusion that the issues raised in a section 301 action to compel arbitration differ from those raised in unfair labor practice proceedings in the Supreme Court's decision in *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 273 (1972). In *Burns*, the Court held that a "successor" employer which hired a majority of the employees in a bargaining unit represented by a recently certified bargaining agent was obligated to bargain with the agent over the terms and conditions of employment. 406 U.S. at 281. The Court expressly refused, however, to impose on the successor the duty to honor the specific contractual obligations embodied in the previous employer's collective bargaining agreement with the employees' representative. 406 U.S. at 291. In discussing this issue the Court distinguished between the statutory obligation to bargain with the union under section 8(d) of the Act and the contractual obligations normally enforced through an action to compel arbitration under section 301, emphasizing that the latter obligations arose as a result of the mutual agreement of the parties. 406 U.S. at 286.

ing of section 2(2) of the Act, 29 U.S.C. § 152(2).[4] The Board's conclusion that nominally separate corporations constitute a "single employer" is essentially a factual one and "not to be disturbed provided substantial evidence in the record supports the Board's findings." *NLRB* v. *Pizza Pizzaz, Inc.*, 646 F.2d 706, 708 (1st Cir. 1981); *NLRB* v. *C.K. Smith & Co.*, 569 F.2d 162, 164 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). To determine whether two or more business entities comprise a single employer, this court has applied the four factors set out in *Radio & Television Broadcast Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam): (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership. *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1075 (1981). No one of these factors is controlling, nor need all of them be present. Single employer status ultimately depends on "all the circumstances of the case" and is marked by an absence of an "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers* v. *NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976). *Accord Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d at 1075; *NLRB* v. *Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level. *Soule Glass & Glazing Co.*, 652 F.2d at 1075; *Sakrete of Northern Cali-*

4. That section provides in part:

When used in this subchapter—

* * *

(2) the term "employer" includes any person acting as an agent of an employer, directly or indirectly, . . .

fornia, Inc. v. *NLRB*, 332 F.2d 902, 907 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

Against this background, we now consider whether the Board's finding of single employer status is supported by substantial evidence.

A. *Interrelation of Operations*

The record unmistakably reflects an interrelation of operations. All of Kennebec's production was purchased by Penntech and in turn sold by Penntech to the public as a Penntech product. Penntech did all of Kennebec's purchasing of materials and supplies. Although Penntech and Kennebec maintained separate payrolls and bank accounts, and filed separate tax returns, Penntech's computers were used to process Kennebec's payroll and employee wage statements. Penntech controlled all of Kennebec's sales, customer relations, credit and billing. These arrangements show a substantial qualitative degree of interrelation of operations. *Cf. Los Angeles Marine Hardware Co.* v. *NLRB*, 602 F.2d 1302, 1305 (9th Cir. 1979) (same customers; central preparation of payroll).

B. *Common Management*

The record also reflects substantial evidence of common management. As previously indicated, several of the same individuals were the officers and directors of all three corporations. Moreover, there is ample evidence to show that John Leslie, a director of Kennebec, as well as a director and the president of both Penntech and T.P., exercised ultimate authority over Kennebec's operations. He spent over 50% of his time at Kennebec between December 1976 and the shutdown in March 1977. Experimentation with the paper making process at Kennebec was controlled by Leslie and it was Leslie who told Kennebec employees in November 1976 that production at the mill had to be

increased. In short, Leslie exercised substantial control over the operations at Kennebec.

In addition to Leslie's significant role in the management of Kennebec, Jack Dodge, vice president of marketing for Penntech, was in control of the marketing aspects of the Kennebec mill as well. Louis Wolfe, who was in charge of scheduling production at the Kennebec mill, was stationed at the Penntech plant in Johnsonburg. He reported to Jim Nesselrode, a Penntech manager, who in turn reported to Jack Dodge. The production schedules were sent daily from Wolfe to personnel at Kennebec who would then see to it that the proper paper was produced.

Thus, top-level management at Penntech was in actual control of the production processes, sales, marketing, accounting, and scheduling of production at Kennebec.

C. *Centralized Control of Labor Relations*

There is also substantial evidence on the record that control of labor relations resided with Penntech. Although Kennebec's day-to-day labor matters were apparently handled at the local level, this fact is not dispositive. " 'A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.' " *Soule Glass & Glazing Co.*, 652 F.2d at 1075, *quoting Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976). In addition to the fact that Penntech orchestrated changes in the collective bargaining agreement prior to its acquisition of Kennebec's stock, St. Ledger's conduct between the March 29, 1977 announcement of the mill shutdown and the first meeting with the union representatives on April 4, 1977, confirms that it was Penntech which exercised actual control over the more significant labor relations matters. During that time St. Ledger had conferred with Leslie as to how the employee layoff should

be classified and was instructed to contact Penntech's attorneys. Moreover, St. Ledger at one point directed the union representatives to contact Penntech's attorneys for answers to their questions regarding the employees' insurance and pensions. From a review of the entire record we find substantial support for a finding that Penntech both possessed and exercised control over critical matters at the policy level, including "the present and apparent means to exercise its clout" in labor relations matters. *Soule Glass & Glazing Co.*, 652 F.2d at 1075.

D. *Common Ownership*

The record further reflects common ownership. Penntech owned 100% of the stock in T.P., and T.P. was a 100% stockholder of Kennebec. *Cf. NLRB* v. *Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S. Ct. 2903 (1982).

In sum, there is substantial evidence in the record considered as a whole supporting the Board's finding that Penntech and its wholly-owned subsidiaries, T.P. and Kennebec, constitute a single employer within the meaning of section 2(2) of the Act. *Soule Glass & Glazing Co.*, 652 F.2d at 1076; *NLRB* v. *Big Bear Supermarkets No. 3*, 640 F.2d 924, 930 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980); *NLRB* v. *Master Slack*, 618 F.2d 7, 8 (6th Cir. 1980).

V

The Section 8(a)(5) and (1) Violation

This brings us to the unfair labor practice found by the Board. Initially, we note that an employer has a duty to bargain with a union over the effects of its decision to close one of its plants. *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681-82 (1981); *Electrical Products Div. of Midland-Ross Corp.* v. *NLRB*, 617 F.2d 977, 983

(3d Cir.), *cert. denied*, 449 U.S. 871 (1980); *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 257 (8th Cir. 1970). Here, the Board concluded that the companies violated section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the unions over the effects on the Kennebec employees of the decision to close the Kennebec mill. The court finds that there is substantial evidence to support this conclusion.

In order to meet its obligation to bargain over the effects on employees of a decision to close, an employer must conduct bargaining "in a meaningful manner and at a meaningful time." *First National Maintenance Corp.*, 452 U.S. at 682. A concomitant element of "meaningful" bargaining is timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible. *NLRB* v. *National Car Rental System, Inc.*, 672 F.2d 1182, 1189 (3d Cir. 1982); *NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). The determination of whether an employer has provided such meaningful and timely notice is essentially one of fact, and the Board's findings in this regard are to be accepted if supported by substantial evidence. *National Car Rental System, Inc.*, 672 F.2d at 1189-90.

On the question of notice, it is clear that the notice to the unions on March 29, 1977 of the decision to terminate Kennebec's operations that very same day did not afford the unions an adequate opportunity to bargain over the effects of that decision upon the employees. The record supports the ALJ's finding that there was no emergency situation which would explain or justify such precipitous action. Furthermore, the companies' testimony to the effect that the decision to close was made on the actual day of the closing—March 29, 1977—was not credited by the ALJ. From the record a fair inference can be drawn that the decision to close was made in advance of that date.

First, T.P. had sent Kennebec a demand letter on March 17, 1977 regarding past due promissory notes in order to protect its lien interest in Kennebec upon closure. Second, production had been poor in January and February 1977, indicating to at least some in top management that the Kennebec mill was on the brink of collapse. Third, equipment was removed from the mill on March 30, 1977, the day after the unions were notified of the closure, indicating advance preparation for the closure. Finally, St. Ledger admitted that he had broached the subject of closure with Penntech's management as far back as November 1976 and again three to four days before the actual shutdown. These facts all point to a decision to close made prior to March 29, 1977.

The companies argue that the unions were put on notice of a possible shutdown in November 1976 when Leslie informed the union representatives of the need for increased production, making an oblique reference to a possible closure in the absence of such an increase. However, a vague remark cannot pass for "reasonable notice" of a shutdown as mandated by the Act. *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 940 (9th Cir. 1977). Even assuming that the unions had sufficient information to suspect that closure was imminent, it did not place an obligation on them to request effects bargaining, since "suspicion or conjecture cannot take the place of notice where notice is required." *ILGWU* v. *NLRB*, 463 F.2d 907, 918 (D.C. Cir. 1972).

Finally, the record is replete with evidence of the companies' failure to bargain in good faith over the effects of closure after the March 29, 1977 announcement to shut down had been made. First, the companies failed to bargain in good faith to the extent that no responsible official from any of the companies was present at the April 4 meeting. St. Ledger disclosed his limited authority when he referred

the union representatives to Penntech's attorneys for answers to their questions. His bargaining authority was insufficient to satisfy the requirements of good faith bargaining. *Cf. NLRB* v. *Maywood Do-Nut Co., Inc.*, 695 F.2d 108 (9th Cir. 1981); *Pepper & Tanner, Inc.*, 197 N.L.R.B. 109 (1972), *enforced on this issue*, 474 F.2d 1256 (6th Cir. 1973). Of even greater significance is that even though equipment had been removed from the mill and Penntech had cut off the flow of funds to Kennebec, and even though Kennebec's industrial relations manager had written to the unions that a resumption of operations by Penntech or any other company was unforeseeable, St. Ledger still advised the unions that Kennebec had not permanently ceased operation and that the employees, therefore, would be on "indefinite" layoff. Not only was this representation disingenuous but, as the Board correctly found, it also constituted bad faith bargaining. *United Steelworkers* v. *NLRB*, 390 F.2d 846, 852 (D.C. Cir. 1967), *cert. denied sub nom. Roanoke Iron & Bridge Works, Inc.* v. *NLRB*, 391 U.S. 904 (1968).

VI

Conclusion

The record considered as a whole supports the findings of fact made by the Board and shows that they are supported by substantial evidence. *NLRB* v. *Enterprise Ass'n, Local 638*, 429 U.S. 507, 531 (1977); *NLRB* v. *Gray-Grimes Tool Co., Inc.*, 557 F.2d 1233, 1234 (6th Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). For this and all the foregoing reasons, the petition for review is denied and the order of the Board is enforced.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1635

PENNTECH PAPERS, INC., T.P. PROPERTY CORPORATION, and KENNEBEC RIVER PULP AND PAPER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNITED PAPERWORKERS INTERNATIONAL UNION, *et al.*,
Intervenors.

DECREE

Entered: April 26, 1983

This cause came on to be heard on petition for review and cross-application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The petition for review is denied, the cross-application for enforcement is granted, and the order of the National Labor Relations Board is hereby affirmed and enforced.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

A TRUE COPY

ATTEST:

/s/ FRANCIS P. SCIGLIANO
Clerk

[Cert. c.: N.L.R.B. and Messrs. Ohlweiler, Fishback and Wyle
cc: Mr. Fuchs]

Opinion of the National Labor Relations Board

263 NLRB No. 33

D—8387
Madison, ME

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PENNTECH PAPERS, INC.; T. P. PROPERTY CORPORATION AND KENNEBEC RIVER PULP AND PAPER COMPANY

and

UNITED PAPERWORKERS INTERNATIONAL UNION, LOCALS 36 AND 73; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS LOCAL 270; INTERNATIONAL BROTHERHOOD OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 559, AFL-CIO

Case 1-CA-12975

and

DISTRICT NO. 99, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case 1-CA-12978

DECISION AND ORDER

On January 21, 1981, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondents, and the Charging Parties filed exceptions, supporting briefs, and

statements of position,[1] and the Charging Parties filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

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1. On September 4, 1981, the Board provided the parties an opportunity to submit statements of position regarding the effect on the present proceeding of *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981), issued after the receipt of briefs herein.

2. Respondents have requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

3. Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

As cited in Respondents' exceptions, the Administrative Law Judge's Decision contains a number of misstatements of fact, which we hereby find to be inadvertent. Contrary to certain findings in the underlying Decision, the record shows that Kennebec River Pulp and Paper Company at all times material herein has been a Maine corporation, all of whose shares have been owned solely by T. P. Property Corporation. T. P. Property purchased Kennebec stock for $225,000, of which $100,000 was in cash and the remainder of which was in notes of T. P. Property. Finally, the Unions herein informed the Regional Director for Region 1 that they were no longer pursuing arbitration of a related grievance by letter of November 15, 1978, and the Regional Director revoked deferral procedures by letter of December 4, 1978.

Opinion of the National Labor Relations Board

In his Decision, the Administrative Law Judge found that Respondents Penntech Papers, Inc., T. P. Property Corporation, and Kennebec River Pulp and Paper Company are a single employer and that Respondents violated Section 8(a)(1) and (5) by failing and refusing to bargain with the Charging Party Unions concerning the decision and effects of closing the Kennebec paper mill in Madison, Maine.

We agree with the Administrative Law Judge's single-employer finding, based on the facts set forth by him. In so finding we agree that this result is not precluded by the principles of *res judicata* or collateral estoppel, based on the outcome of a prior court suit by the Unions herein to compel arbitration by Penntech, T. P. Property, and Kennebec under the terms of a bargaining agreement executed by Kennebec.[4] In that suit, under Section 301 of the Labor Management Relations Act, the district court applied Federal common law and held that the separate corporate existence of Penntech and T. P. Property would not be ignored in order to compel them to join Kennebec in the arbitration of a dispute under a bargaining agreement to which they were not signatories. In affirming this holding, the circuit court stated:

> We also agree that the real issue in this case is . . . whether parent corporations should be bound to the collective-bargaining agreements of their subsidiaries. [583 F.2d at 35.]

However, the present proceeding, as noted by the General Counsel, is based on allegations that Penntech, T. P. Property Corporation, and Kennebec are a single employer under the National Labor Relations Act, and that they engaged in unfair labor practices in violation of Section 8(a)

4. *United Paperworkers International Union* v. *T. P. Property Corp., et al.*, 583 F.2d 33 (1st Cir. 1978), affg. 439 F.Supp. 610 (1977).

(1) and (5) of the Act. This proceeding, consequently, is not controlled by Federal common law and the issue is not the enforceability of the provisions of a specific bargaining agreement. On the contrary, the Board's test is, as stated with approval by the Supreme Court in *Radio & Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965):

> [I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, N.L.R.B. Twenty-first Ann. Rep. 14-15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.[5]

An examination of these criteria was not the basis for the holdings in the aforementioned court proceedings. Accordingly, due to the lack of identity in either the cause of action or the respective issues involved, it is manifest that the principles of *res judicata* and collateral estoppel do not apply. The criteria cited from *Broadcast Service of Mobile, supra,* were those relied upon by the Administrative Law Judge, they are the criteria distinctly applicable to Board proceedings on this issue, and the conclusion that Respondents are a single employer is fully supported by the record.

Regarding the disputed violations, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) and (5) only to the extent that they failed and refused to bargain about the effects of the decision to

5. See also *N.L.R.B.* v. *C. K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), cert. denied 436 U.S. 957 (1978); *N.L.R.B.* v. *Pizza Pizzaz, Inc., d/b/a Jacob Wirth Restaurant*, 646 F.2d 706 (1st Cir. 1981).

close the Kennebec plant. In his complaint, the General Counsel did not allege that Respondents engaged in unlawful conduct involving its actual decision to close the Kennebec plant, and at the hearing he resisted the Charging Parties' attempt to amend the complaint to place into issue this allegation. Accordingly, he expressly limited the violation alleged to involve only Respondents' failure to bargain about the effects of the closing. In these circumstances we find merit in the exceptions of the General Counsel and Respondents and conclude that the legality of Respondents' actual decision to close the plant was not properly before the Administrative Law Judge and that he should not have granted the Charging Parties' motion to amend the complaint in this regard.[6]

We also reject the Charging Parties' exception that we find Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing employment terms incident to their decision to close the Kennebec plant. At the hearing

6. Member Jenkins concurs in the finding that Respondents have not violated Sec. 8(a)(5) and (1) by not bargaining about the decision to close the Kennebec plant, but does so in light of the recent Supreme Court opinion in *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981). In reaching this decision on the merits, he finds that the issue was before the Administrative Law Judge. The evidence considered was neither objected to by the General Counsel nor introduced for a limited purpose. In addition, Respondents received adequate notice during the course of the hearing that the Charging Parties sought to litigate Respondents' duty to bargain about the decision to close, a matter closely connected to the charge and complaint herein regarding Respondents' duty to bargain about the effects of that decision. Accordingly, as this issue was fully litigated at the hearing, he would find the belated objection of the General Counsel regarding the scope of the instant proceeding to be without merit. See *M & J Trucking Co., Inc.*, 214 NLRB 592, 597 (1974); *Clinton Foods, Inc., d/b/a Morton's I.G.A. Foodliner, et al.*, 240 NLRB 1246 (1979). In his view, the decisions relied upon by the General Counsel and Respondents are distinguishable in that the evidence sought to be relied upon in those cases was objected to by the General Counsel prior to its admission. See, for example, *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1420 (1976).

the General Counsel disavowed any intention to expand the scope of the complaint to cover such an allegation. Accordingly, this allegation may not be litigated in this proceeding.[7]

The General Counsel and the Charging Parties assert that the Administrative Law Judge's description of the appropriate bargaining units for which the Unions herein are the employees' respective bargaining representatives is inaccurate. The General Counsel notes that the Administrative Law Judge's reliance on portions of the complaint, admitted by Respondents, is the source of this alleged inaccuracy. The General Counsel and the Charging Parties further point out that such unit descriptions are not fully reflective of the various job classifications set forth in the joint bargaining agreement between Kennebec and the Unions herein and that the unit description of the largest of the four units is omitted entirely. Upon review of these contentions in light of the applicable joint bargaining agreement, it appears that the General Counsel's and the Charging Parties' revised unit descriptions are identical and consistent with the job classifications in that agreement. Noting that Respondents have raised no objection to these revisions, we find that the respective appropriate bargaining units represented by the Unions herein are as stated in these exceptions and are set forth below in our Order.

The Remedy

Having found that Respondents have engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that they cease and

7. Member Jenkins concurs in finding no merit to this exception. At no time during the hearing did the Charging Parties put Respondents on notice that this issue was being litigated. In the absence of adequate notice and opportunity to litigate fully the issue, he finds no merit in the Charging Parties' contentions with respect to this issue. See *The Nestle Company*, 248 NLRB 732, fn. 3 (1980).

desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

As a result of Respondents' unlawful failure to bargain about the effects of their partial cessation of operations, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representatives at a time when Respondents might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Unions. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require Respondents to bargain with the Unions concerning the effects on their employees, of the closing of their operations, and shall include in our Order a limited backpay requirement[8] designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for Respondents. We shall do so in this case by requiring Respondents to pay backpay to their employees in a manner similar to that required in *Transmarine*.[9] Thus, Respondents shall pay employees backpay at the rate of their normal wages when last in Respondents' employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date Respondents bar-

8. We have indicated that backpay orders are appropriate means of remedying 8(a)(5) violations of the type involved herein, even where such violations are unaccompanied by a discriminatory shutdown of operations. Cf. *Royal Plating and Polishing Co., Inc.*, 148 NLRB 545, 548 (1964), and cases cited therein.

9. *Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc.*, 170 NLRB 389 (1968).

gain to agreement with the Unions on those subjects pertaining to the effects of the closing of Respondents' operations on their employees; (2) a bona fide impasse in bargaining; (3) the failure of the Unions to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of Respondents' notice of their desire to bargain with the Union; or (4) the subsequent failure of the Unions to bargain in good faith; but in no event shall the sum to any of these employees exceed the amount he or she would have earned as wages from March 29, 1977, the date on which Respondents terminated the Madison, Maine, operations, to the time he or she secured equivalent employment elsewhere, or the date on which Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the normal rate of their normal wages when last in Respondents' employ.[10] Interest on all such sums shall be paid in the manner prescribed in *Florida*

10. *Transmarine Navigation Corporation, supra.* In the absence of allegations and a finding that Respondents unlawfully rescinded contractual provisions covering the permanent layoff of Kennebec employees, we find no basis for modifying this traditional remedy in order to award additional sums which might have been due under the terms of that bargaining agreement.

In remedying Respondents' failure to bargain over the effects of the decision to close the Kennebec plant, Member Jenkins joins the majority in its stated purpose of providing the employees' collective-bargaining representative with a measure of economic strength which would have existed had bargaining occurred when Respondents still were in need of the employees' services. Accordingly, he agrees with the majority's formulation of a traditional limited backpay requirement. However, where the parties' relevant bargaining agreement, negotiated when the employees' services were in fact needed, provides additional provisions for backpay in the present circumstances, he would find that the traditional remedy should be modified to take these additional provisions into account. He notes that even in the absence of a finding that these benefits were unilaterally withdrawn, it is within the scope of our remedial powers to provide for backpay in part based on the terms negotiated by the parties.

Steel Corporation, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[11]

To effectuate further the policies of the Act, Respondents shall be required to establish a preferential hiring list of all terminated unit employees following the system of seniority provided for in the collective-bargaining agreement and, if Respondents ever resume operations anywhere in the Madison, Maine, area, they shall be required to offer these employees reinstatement. If, however, Respondents were to resume their Madison operation, Respondents shall be required to offer unit employees reinstatement to their former or substantially equivalent positions.[12]

Furthermore, in view of the fact that Respondents' Kennebec facility is no longer in operation and their former employees may be in different locations, we shall order Respondents to mail each of their employees employed on the date they ceased operations copies of the attached notice signed by Respondents.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Penntech Papers, Inc., T. P. Property Corporation and Kennebec River Pulp and Paper Company, Madison, Maine, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with United Paperworkers International Union, Locals 36 and 73; Interna-

11. In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

12. *Drapery Manufacturing Co., Inc., and American White Goods Company*, 170 NLRB 1706 (1968); *Burgmeyer Bros., Inc.*, 254 NLRB 1027 (1981).

tional Brotherhood of Firemen & Oilers Local 270; and International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, herein called the Unions, as the exclusive representatives of employees in the appropriate units set forth herein below with respect to the effect on their represented employees of the decision to close the Kennebec facility.

The appropriate unit represented by United Paperworkers International Union, Local 36, is:

> All bleach plant operators, panel board operators, chemical makeup men no. 1, chemical make up men no. 2, floor men, brake beatermen, hydra-pulper operators, head grinder men, magazine men, screen men, lead men (lower grinder room), grinder men, woodmen, lead men (wet room), Kamyr operators, shippers, fork lift truck operators (wet room), Kamyr operators' helpers, oilers-cleaners, lead men (wood room), operators, sorters, feeders, bark truck employees, truck drivers, crane operators, rackmen, rakemen, turbine operators, station operators, station operators' helpers, switchboard operator (power station), weighers, fork lift truck operators (finishing and shipping), car men, finishers, finisher helpers, core and wrapper men, label and samples employees, laborers, cleaners and spare pool employees employed by Respondents at the Madison, Maine, locations, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The appropriate unit represented by United Paperworkers International Union, Local 73, is:

> All machine tenders, back tenders, third hands, fourth hands, fifth hands, coater tenders, beater engineers and

utility men employed by Respondents at the Madison, Maine, locations, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The appropriate unit represented by International Brotherhood of Firemen & Oilers Local 270 is:

All head firemen, head oilers and oilers employed by Respondents at the Madison, Maine, locations, excluding management employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The appropriate unit represented by International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, is:

All chief electricians, fire chiefs, shift motormen, head journeymen, and journeymen AAA, AA, A, B and C and journeymen helpers A, B, C and D in the following crafts: machinists, millwrights, pipers, masons, blacksmiths, painters, electricians, welders, tinsmiths, instrument men, roll grinders and knife grinders employed by Respondents at the Madison, Maine, locations, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with the Unions as the exclusive bargaining representatives of all employees in the aforesaid appropriate units with respect to the effect on their employees of the decision to terminate their operations in Madison, Maine, and, if any understanding is reached, embody it in a signed agreement.

(b) Pay the terminated employees their normal wages for the period set forth in the remedy section of this Decision.

(c) Establish a preferential hiring list of all employees in the appropriate units, following the system of seniority provided for under the collective-bargaining contract with the Unions and, if operations are ever resumed anywhere in the Madison, Maine, area, offer reinstatement to those employees. If, however, Respondents were to resume their operations at the Madison, Maine facility, they shall offer all those in the appropriate units reinstatement to their former or substantially equivalent positions.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail an exact copy of the attached notice marked "Appendix"[13] to the Unions herein and to all employees

13. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employed by Respondents in the above-described appropriate units at the Madison, Maine, facility. Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by their authorized representative, shall be mailed immediately upon receipt thereof, as herein directed.

(f) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 9, 1982

John H. Fanning,	Member
Howard Jenkins, Jr.,	Member
Don A. Zimmerman,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail and refuse to bargain with United Paperworkers International Union, Locals 36 and 73; International Brotherhood of Firemen & Oilers Local 270; International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, concerning the effects of our decision to close our Madison, Maine, facility on the employees in the bargaining units described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with United Paperworkers International Union, Locals 36 and 73; International Brotherhood of Firemen & Oilers Local 270; and International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, as the exclusive representatives of the employees in the respective bargaining units described below, concerning the effects or [*sic*] our decision to close our Madison, Maine, facility on unit employees, and reduce in

writing any agreement reached as a result of such bargaining.

WE WILL pay the employees who were employed at the above facility their normal wages for a period specified by the National Labor Relations Board, plus interest.

The bargaining unit, represented by United Paperworkers International Union, Local 36, is:

> All bleach plant operators, panel board operators, chemical makeup men no. 1, chemical makeup men no. 2, floormen, broke [*sic*] beatermen, hydra-pulper operators, head grinder men, magazine men, screen men, lead men (lower grinder room), grinder men, woodmen, lead men (wet room), Kamyr operators, shippers, fork lift truck operators (wet room), Kamyr operators' helpers, oilers-cleaners, lead men (wood room), operators, sorters, feeders, bark truck employees, truck drivers, crane operators, rackmen, rakemen, turbine operators, station operators, station operators' helpers, switchboard operator (power station), weighers, fork lift truck operators (finishing and shipping), car men, finishers, finisher helpers, core and wrapper men, label and samples employees, laborers, cleaners and spare pool employees employed by us at the Madison, Maine, location, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The bargaining unit represented by United Paperworkers International Union, Local 73, is:

> All machine tenders, back tenders, third hands, fourth hands, fifth hands, coater tenders, beater en-

gineers and utility men employed by us at the Madison, Maine, location, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The bargaining unit represented by International Brotherhood of Firemen & Oilers Local 270 is:

All head firemen, head oilers and oilers employed by us at the Madison, Maine, location, excluding management employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

The bargaining unit represented by International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, is:

All chief electricians, fire chiefs, and shift motormen, head journeymen, and journeymen AAA, AA, A, B and C and journeymen helpers A, B, C, and D in the following crafts: machinists, millwrights, pipers, masons, blacksmiths, painters, electricians, welders, tinsmiths, instrument men, roll grinders and knife grinders employed by us at the Madison, Maine, location, excluding management employees, superintendents, foremen, assistant foremen, laboratory employees, office forces, scalers, storekeepers, watchmen, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL establish a preferential hiring list of all terminated employees in the above bargaining units, following the seniority system provided for in the collective-bargaining agreement with the Unions and, if we resume operations anywhere in the Madison area,

we shall offer these employees reinstatement. If, however, we resume our operations at the Madison facility, said unit employees shall be offered reinstatement to their former or substantially equivalent positions.

PENNTECH PAPERS, INC.;
T. P. PROPERTY CORPORATION;
KENNEBEC RIVER PULP AND
PAPER COMPANY

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-4550.

Opinion of the National Labor Relations Board

JD-715-80

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PENNTECH PAPERS, INC.; T.P. PROPERTY CORPORATION AND KENNEBEC RIVER PULP AND PAPER COMPANY

and

UNITED PAPERWORKERS INTERNATIONAL UNION, LOCALS 36 AND 73; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS LOCAL 270; INTERNATIONAL BROTHERHOOD OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 559, AFL-CIO

Case 1-CA-12975

and

DISTRICT NO. 99, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case 1-CA-12978

ADDENDUM

The Decision in the above-captioned matter issued on January 21, 1981, with line numbers inadvertently omitted from the pages. We are herewith supplying copies of the Decision with line numbers.

Dated, Washington, DC March 3, 1981.

/s/ MELVIN J. WELLES

Melvin J. Welles
Chief Adm. Law Judge

JD-715-80
Madison, ME

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PENNTECH PAPERS, INC.; T.P. PROPERTY CORPORATION AND KENNEBEC RIVER PULP AND PAPER COMPANY

and

UNITED PAPERWORKERS INTERNATIONAL UNION, LOCALS 36 AND 73; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS LOCAL 270; INTERNATIONAL BROTHERHOOD OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 559, AFL-CIO

Case 1-CA-12975

and

DISTRICT NO. 99, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case 1-CA-12978

Gary S. Cooper, Esq., of Boston, MA, for the General Counsel.

John W. Ohlweiler, Esq., and *James S. Frank, Esq.*, of New York, NY, for the Respondents Penntech Papers, Inc., and T.P. Property Corporation.

Opinion of the National Labor Relations Board

Sidney St. F. Thaxter, Esq., and *Roland Epstein, Esq.*, of Portland, ME, for Respondent Kennebec River Pulp and Paper Company.

Benjamin Wyle, Esq., of New York, NY, for the Charging Party.

DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: The charge filed in Case 1-CA-12975 on April 11, 1977, by United Paperworkers International Union, Locals 36 and 73 (herein referred to as Locals 36 and 73), and International Brotherhood of Firemen & Oilers Local 270 (herein referred to as Local 270) was served on Kennebec River Pulp and Paper Company, herein referred to as Kennebec, a Respondent herein, on April 11, 1977. The charge in Case 1-CA-12978 filed by District 99, International Association of Machinists and Aerospace Workers, AFL-CIO,[1] on April 11, 1977, was served on Kennebec on April 11, 1977. An amended charge in Case 1-CA-12975, filed on November 7, 1977, was served on Kennebec, Penntech Papers, Inc., herein referred to as Penntech, and T.P. Property Corporation, herein referred to as T.P. Property, Respondents herein, on November 8, 1977. On January 23, 1979, an order consolidating cases, complaint and notice of hearing was issued. In the complaint it was alleged among other things that the Respondents were a single employer and that since March 26, 1977, the Respondents have refused to bargain in good faith over the effects of the closedown of their Madison, Maine, facility in violation of the National Labor Relations Act, as amended, herein referred to as the Act.

The Respondents Penntech and T.P. Property filed a timely joint answer; Kennebec answered separately. In these answers certain admissions were made and affirmative

1. The Local involved was Local 559.

defenses pled which have been duly considered in this Decision. The consolidated cases came on for hearing on August 29, 30, and 31, September 4, 5, and 6, October 30, 1979,[2] and July 29 and 30, 1980 at Waterville, Maine. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record,[3] to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs[4] have been carefully considered.[5]

Findings of Fact, Conclusions, and Reasons Therefor

I. The Business of the Respondents

Penntech and T.P. Property are and have been at all times material herein corporations duly organized under and existing by virtue of the laws of the State of Delaware. Kennebec is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of New York.

2. On this date the Charging Parties moved for a continuance in order to "file an amended charge with the Regional Office . . . making it crystal clear that one of the elements in the case is the issue of refusal to bargain over the decision to close the plant." All parties being in agreement, the cases were continued. An amended charge was filed which was dismissed by the Regional Director. His dismissal was affirmed on appeal. The hearing was reconvened on July 29, 1980.

3. There being no opposition thereto, the General Counsel's motion to correct transcript is granted. The transcript is corrected accordingly.

4. The General Counsel and the Respondents were given an opportunity to reply to the following issues raised in the Charging Parties' brief: "The Charging Party can properly move to conform the pleadings to the Proof," "The failure of the company to bargain over its decision to close Kennebec violates [Section] 8(a)(1) and (5) of the Act," and "Unilateral changes in working conditions by the Company violates the Act." Briefs were filed by the General Counsel and the Respondents which have been carefully considered.

5. The foregoing unions are referred to collectively as the Unions.

Penntech and T.P. Property maintained an office in the city of New York and Penntech is engaged in the operation of a mill located in Johnsonburg, Pennyslvania. Kennebec maintained its principal office and place of business in Madison, Maine, where it operated a papermill at various times until March 26, 1977. Penntech in the course and conduct of its business has caused quantities of materials used by it in the operation of its mill to be purchased and transported in interstate commerce and has caused paper products to be sold and transported from its Johnsonburg mill in interstate commerce.

Kennebec in the course and conduct of its business has caused at all times herein material large quantities of materials used by it in the operation of its mills to be purchased and transported in interstate commerce from and through various States of the United States other than the State of Maine and has caused at all times herein mentioned substantial quantities of paper products to be sold and transported from its Madison facility in interstate commerce to States of the United States other than the State of Maine.

Penntech and T.P. Property annually purchase goods and services valued in excess of $50,000 directly from points outside Pennsylvania. Kennebec prior to March 29, 1977, annually purchased goods and materials valued in excess of $50,000 directly from points outside the State of Maine. Penntech and T.P. Property annually ship goods and materials valued in excess of $50,000 directly to points located outside the Commonwealth of Pennsylvania. Kennebec, up until March 29, 1977, annually shipped goods and services valued in excess of $50,000 directly to points located outside the State of Maine.

The Respondents are now and have been at all times material herein employers within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The Unions are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

First: Kennebec acquired the Madison Mills, herein referred to as the Kennebec Mills, in 1959. As of 1971 all of the outstanding stock of Kennbec was owned by 10 educational and charitable institutions. In 1971, in order to finance the rebuilding of its No. One Paper Machine, Kennebec effected a $4,953,900 sale and lease-back financing which in essence conveyed all of Kennebec's assets to the Kennebec Development Corporation (hereinafter referred to as KDC). KDC obtained the funds for this project through the issuance of bonds which were secured by a real estate mortgage. Kennebec's lease payments were to be used to retire the bonds. Under the terms of the lease, if Kennebec fulfilled its obligation in respect thereto, it could buy back the premises for KDC for a nominal sum. KDC assigned its interest in the lease to Merrill Trust Company, the mortgagee and trustee of the bonds. Kennebec personally guaranteed the payment of the bonds, as did the State of Maine through the Maine Industrial Building Authority, which later became the Maine Guarantee Authority hereinafter referred to as MGA.

The Unions had been Kennebec's employees' bargaining representatives since the mill commenced operations in Madison.

In 1971 and in 1972 Kennebec experienced losses of $2,157,907 and $3,247,234, respectively. In 1973 Southestern Capital Corporation (herein called SCC) acquired the stock of Kennebec from the charitable institutions and provided additional financing for continued operation. Kennebec lost

$3,725,374 in 1975. On December 20, 1976 [*sic*], while still under the ownership of Southeastern Capital Corporation, Kennebec discontinued its operations and laid off all its employees other than a skeleton force. Thereafter T.P. Property, a wholly owned subsidiary of Penntech, acquired all the outstanding stock of Kennebec on March 3, 1976. T.P. Property, a Delaware corporation, was organized by Penntech and incorporated on May 12, 1975. T.P. Property was initially incorporated to purchase a real estate parcel, containing a supermarket, which was adjacent to Penntech's papermill in Johnsonburg, Pennsylvania. The purchase was not effected. T.P. Property had no other corporate function until its purchase of the Kennebec capital stock.

During the negotiations for the acquisition of the Kennebec stock, Penntech and Southern Capital Corporation opened a joint bank account to which they contributed equal amounts to finance the employment by Kennebec of individuals on the mill premises to maintain the premises and the boilers.

Prior to acquisition in March 1976 Kennebec effected a write-down of its debt with four major secured creditors. T.P. Property and Penntech participated in the negotiations. Penntech guaranteed approximately 25 percent on a nonaccelerated basis of such debt as written down. Otherwise, Kennebec's financial structure remained the same.

Prior to the acquisition, T.P. Property's immediate liquid assets consisted of several hundred thousand dollars, derived from an advance from Penntech with the acknowledged purpose that the advance was to accomplish the Kennebec stock acquisition. The purchase price paid for the Kennebec stock was $225,000, $10,000 of which was cash and $215,000 of which were notes of T.P. Property.

Around March 3, 1976, T.P. Property made advances to Kennebec in the amount of $101,000 for which Kennebec executed two demand notes dated March 3, 1976, in principal amounts of $1,000 and $100,000. Additionally, Ken-

nebec granted T.P. Property security interest in certain property and after acquired property such as inventory, equipment, accounts, etc.

Shortly after March 3, 1976, the operations of Kennebec mill were resumed. Laid-off employees covered by the labor agreement were recalled. Most of the salaried employees also continued in the employment of Kennebec, including William Anderson, marketing manager; Kenneth Smith, director of scheduling; Arthur Leho, manager of engineering and maintenance; Robert Rowell, accountant; and John McLeod, industrial relations manager. Donald Martin, president, was replaced by Allen Nadeau, a vice president of Penntech.

Penntech, a Delaware corporation, incorporated in 1920, owned and operated a papermill located in Johnsonburg, Pennsylvania, and maintained a corporate office in New York.

According to William B. Ford, vice president of finance and security of Penntech, a loss had been expected in Kennebec's operation for 4 or 5 months after startup; a profitable operation was anticipated in late 1976. Profitable operations were not achieved as anticipated and Kennebec was faced with the prospect of defaulting in its obligations to make certain lease and tax payments due and owing on November 15, 1976. Minutes of the meeting of Penntech's board of directors on October 18, 1976, disclose:

> The Chairman stated that progress to date in the effort to improve productivity at the Company's Kennebec River Pulp & Paper Co., Inc. subsidiary was less than had been anticipated at the time the subsidiary was acquired. A detailed review of operational and financial problems encountered at the Kennebec mill was then presented to the Board by the Chairman, Mr. Dodge, Mr. Nadeau and Mr. Ford. The Chairman indicated that certain proposals to the Maine Guarantee

> Authority for deferral of Kennebec debt and tax obligations were being developed which, if accepted by the Authority, would make it possible to continue operations at the Kennebec mill for several more months during which time solutions to the operational problems could be developed. These matters were then fully discussed, and it was agreed that the negotiations with the Maine Guarantee Authority should proceed and that the Company should continue operations at Kennebec pending the conclusion of the negotiations. [Jt. Exh. 4, p. 797.]

At this time a decision had also been made for Penntech "not to advance the funds that would avoid default."

The minutes of the November 17, 1976, meeting of the Maine Guarantee Authority (MGA) reveal:

> Mr. Ford and Mr. Weinroth reviewed the progress at Kennebec River Pulp & Paper Company, Inc. since Penntech Papers, Inc. had purchased it in March 1976. A lengthy discussion took place relative to the financial investment already made by Penntech, the fine market acceptance of Kennebec's products, the production and engineering problems which had been overcome, those that still needed to be overcome, the financial situation facing Kennebec and the various alternatives open to the Authority.

Thereafter the MGA adopted a motion accepting in principle the provisions of the Letter Agreement dated November 22, 1976.

The "Letter Agreement" dated November 22, 1976, was executed between MGA, Merrill, KDC, T.P. Property, and American General Bond Fund, Inc., as a means of channeling additional funds into Kennebec's operations. The agreement provided a device by which certain payments due on KDC bonds and tax obligations would be met by MGA's purchase of certain timberlands from KDC which Kennebec

had originally owned. Upon the purchase of such timberlands, T.P. Property was required to make available $500,000 for Kennebec in addition to funds which had been made available prior to November 22, 1976 ($2,832,000). Additionally, T.P. Property was allowed an option to purchase certain timberlands owned by KDC, the purchase price of which would consist of advances over $3,332,000 to Kennebec. Attached to the agreement was a paragraph in which Penntech agreed to provide the $500,000 above mentioned to T.P. Property.

The Letter Agreement further provided that "Kennebec shall furnish to MGA, within 20 days after the end of each operating month of Kennebec, a copy of Kennebec's confidential, internal management report . . . which shall include an income statement for the year to date and a balance sheet as of the last day of such operation month." (Jt. Exh. 4, p. 595.) As recited in the Letter Agreement its purpose was to "provide incentives for continuing the operations of Kennebec (including specifically its papermill in Madison, Maine) and in order to induce Kennebec and the other parties to participate herein."

While Penntech's commitment bears the date of November 22, 1976, acknowledgements attached to the Letter Agreement for Kennebec, MGA, Merrill, KDC, T.P. Property, and American General Bond Fund, Inc., are dated respectively, February 10, February 15, February 15, February 15, February 15, and February 9, 1977. The minutes of the meeting of Penntech's board of directors dated March 9, 1977, reveal:

> The Chairman advised the meeting that the arrangements negotiated with the Maine Guarantee Authority whereby the Corporation's subsidiary T.P. Property Corp. would purchase timberland owned by its subsidiary Kennebec River Pulp & Paper Company, Inc. in order to provide operating funds to the latter had been concluded on February 28, 1977. These arrange-

ments, and the Corporation's agreement to guarantee certain obligations of, and to advance funds to, T.P. Property Corp., were summarized. On motion, duly seconded, all actions taken by the Corporation's officers in connection with these agreements were ratified and approved.

Mr. Ford then presented a brief review of operations for the month of January 1977 at the Corporation's two papermills, and a summary of the Corporation's financial statements for the year 1976, noting that they were before final audit adjustments which had not yet been made by the Corporation's outside auditors. [Jt. Exh. 4, pp. 802, 803.]

Pursuant to the Letter Agreement T.P. Property in February 1977 obtained title to certain timberlands. According to Ford the consideration was around $800,000. However, because of the credit T.P. Property had received for previous advances to Kennebec, "the land transaction was primarily a cancellation of indebtedness." The purchase money constituted T.P. Property's advancements to Kennebec. Thus, under the Letter Agreement T.P. Property obtained timberlands for money advanced and paid to Kennebec.

On November 19, 1976, union representatives and department heads were assembled at the "company house" in Madison. John Leslie, director of Kennebec, president and chairman of the board of Penntech, and president and director of T.P. Property, told the assemblage that unless production immediately increased to specified levels the Kennebec mill would not be viable for continued operations. As related by Bruce St. Ledger, the then manager of Kennebec mill, Leslie told the audience that "the production over a relatively short period of time had to be increased to the rate of 120 saleable tons per day. And, that after that was accomplished, at some period of time not specified follow-

ing that it had to be raised to 140 to 150 tons per day or the mill was not viable for continued operation." Douglas E. Murray, president of Local 36, remembered Leslie to have said that "if these things didn't happen that we're going down. They're not putting any money in it. And Kennebec River would be down and they are not taking Penntech with them." Or as Blanchard Hupper, secretary and treasurer of Local 270, testified, "Kennebec . . . was not going to drag Penntech with it." Clifford Miller, president of Local 73, also testified that Leslie said that "he was not going to drag Penntech down with us." According to St. Ledger the union representatives present at the meeting were "not given an opportunity at that time to respond—to Mr. Leslie directly."

After the meeting production improved for 3 or 4 weeks and then fell off. At no time thereafter did production reach the standards mentioned by Leslie in the November 19 meeting. Such lack of achievement was attributed by St. Ledger to "excessive number of breaks on the paper machine, [and] the addition of the size presses in September had, in fact, reduced the speed at which the paper machine could be operated on particular grades. There were considerable maintenance difficulties or maintenance breakdowns." Other witnesses added that the use of sludge and the lack of preventive maintenance also attributed to the inability to reach the goals set by Leslie. According to St. Ledger the failure to reach these goals was not due in any part to the "lack of cooperation of the employees."

"[B]etween December '76 until the mill shut down [Leslie] was very much hands on during that period." He was on the Kennebec premises "over fifty percent of the time."

On March 17, T.P. Property addressed a letter, signed by Leslie as president, to Kennebec as follows:

> Reference is made to the promissory note of Kennebec River Pulp & Paper Company, Inc. (Kennebec)

dated March 3, 1976 payable on demand to the order of T.P. Property Corp. (TP) in the original principal amount of $100,000 and the promissory note of Kennebec dated December 31, 1976 payable on demand to the order of TP in the original principal amount of $2,700,000. Such notes are collectively herein referred to as the Notes. No payments have been made by Kennebec under the Notes.

This is to confirm that on March 16, 1977 TP demanded payment of $2,500,000 loaned to Kennebec and evidenced by the Notes. TP hereby repeats said demand for payment.

TP reserves the right to demand payment of the additional principal evidenced by the Notes and payment of the other amounts required to be paid under the Notes. TP further reserves the right to demand payment of other amounts loaned to Kennebec.

According to Ford this letter was tendered "in anticipation of a possible shutdown. Better our position properly for exercising the lien." Kennebec had no means of meeting the demand.

Twelve days after the date of the letter, on March 29, 1977, St. Ledger assembled the union representatives around 1:30 p.m. and advised the employees that the mill would be shut down and the employees should have that accomplished by 3 o'clock. The "maintenance people were to move their tools from the property" and "personnel" were given 3 days "to get their clothing and stuff out of their lockers."

According to Ford, Kennebec had lost "about $750,000" in January and February 1977 and "it was very obvious from the production levels that were being achieved in March that March was going to be a very sizeable loss also."

After the operations report in February 1977 Ford concluded that Kennebec would not profitably operate in the future; "it became obvious from the analysis of that report that a number of the steps we had taken were not being successful." Ford "transmitted [his] ideas on this subject to everyone in management in both companies."

Between November 19, 1976, and March 29, 1977, the Respondents had not engaged the Union in any discussions in regard to the prospects of the Kennebec mill's termination of operations. Ford testified that there had been "some discussion" about whether to talk with the Unions in reference to reducing wages or "something of that character," but, "We felt, basically, that any amount involved in doing so or what could be reasonably be bargained would not be even helpful to reducing losses of this magnitude." Thus it would appear that the Unions were bypassed and that it was with deliberate intent that they were not informed of the impending termination of Kennebec mill's operations.

St. Ledger, whom I do not consider to be a credible witness on the whole, testified that the termination of Kennebec mill's operations occurred without any specific discussions on the subject prior to March 29, 1977. St. Ledger first testified that on that date he informed Leslie by phone that he did not "feel that it was going to be a viable operation in view of the present condition of funds being short and it was going to take a great deal more money and it was [his] recommendation to shut the mill down." Later Leslie denied that "shortage of funds" had been mentioned. St. Ledger testified, ". . . we had a discussion involving consideration of the production at the level which it was at, and he asked for my recommendation and I said that I recommended that we shut the mill down. . . . [T]he reason was that we obviously were not meeting the production required in order to make it a viable, profitable operation."

While St. Ledger insisted that it was his decision to close the mill he admitted that Leslie had the power to veto the decision.

On the same date Leslie decided that Penntech "would no longer cover the losses of Kennebec." In this regard St. Ledger claimed that the decision to close the mill on March 29 had been made prior to Leslie's decision. However, in any event the "cut off" of funds meant that "Kennebec probably would have no choice but to [shut] down."

Although St. Ledger testified that he had made the final decision to close the mill his testimony in this respect is not credited. Not only is it unrealistic for Leslie to have allowed St. Ledger to have made such an important decision but St. Ledger told the union representatives at the April 4, 1977, meeting (see *infra*) that he had received a call and was told to shut down the mill.[6]

The decision to close the mill was not discussed with any other officers of Kennebec. Ford, the other director, learned of the closing after the fact.

After the decision to close the mill was communicated, St. Ledger and Leslie discussed the procedure to be followed in shutting down the mill "as far as cleanup and maintenance and maintaining whatever operations [the mill] was going to maintain." The Respondents acted "so expeditiously" in closing the mill because, according to St. Ledger, "there was no reason for prolonging it. The decision had been made, and there was no point in having rumors circulated."

On March 30, 1977, John E. McLeod, manager of industrial relations, addressed a letter to George Lambertson,

6. It is also significant that the record does not disclose that St. Ledger was privy to the Letter Agreement. Had Kennebec mill been closed prior to the consummation of the real estate deal, T.P. Property's chance to recoup around $800,000 would have probably been imperiled. Thus it seems reasonable to conclude that Leslie chose the shutdown date so as not to interfere with such an important and financially rewarding deal.

International representative of United Paperworkers International Union,[7] advising of the closing of the mill on March 29, 1977, and observing, "This would immediately result in an indefinite layoff of virtually all of the mill employees, salaried as well as hourly and *total layoff within the near future.*" The final paragraph read, "Although we cannot see any possibility of Penntech resuming operation *nor can we see the purchase or operation of the Company by any other firm,* we shall treat the layoff of personnel as indefinite so that full recall rights will be afforded all concerned." (C.P. Exh. 1, emphasis supplied.)

Lambertson first heard of the mill's closing on March 29, 1977, over the radio while driving his car on the same date. He contacted Manager of Industrial Relations McLeod and a meeting was set for April 4, 1977.

Prior to this meeting and by letter dated March 20, 1977, Kennebec acknowledged that T.P. Property "has

7. The current labor agreement provides:

C. INDEFINITE LAYOFF

Indefinite layoff procedures shall be implemented for layoffs of unknown duration which extend beyond the maximum allowable time period stipulated for short-term layoffs and they shall remain in effect until the earlier of:

1. The resumption of the operation(s).
2. The expiration of six (6) continuous months of layoffs including cut-back, short-term and indefinite layoff periods. The six (6) months period may, by mutual agreement of all parties, be extended.
3. The decision of management to permanently shut down a portion or portions of its operations.

D. REDUCTION IN WORK FORCE

Reduction in work force procedures shall be implemented upon:

1. The expiration of the maximum allowable duration for an indefinite layoff.
2. The decision of Management to permanently shut down a portion or portion [*sic*] of its operations.

taken possession of the property upon which it has a first security interest." (Jt. Exh. 4, p. 480.) This included all supplies, materials and spare parts, finished goods, four trucks, a front-end loader, two mobile cranes, and waste paper and softwood pulp. Immediately after the shutdown salaried employees were instructed to make stencils which read "subject to the first security interest of T.P. Properties" and to stencil a "great deal of equipment" and the "store room door." The storeroom was "cleaned out, loaded into a moving van, moved away." Other items were also being removed. These facts were known to the union representatives prior to the April 4, 1977, meeting.

Second: St. Ledger and McLeod appeared at the April 4 meeting. St. Ledger indicated that he was also representing Penntech. Representatives of all the contracting unions were also present. Lambertson acted as spokesman for the Unions.

According to St. Ledger the union representatives were "requesting answers regarding the length of the time of the layoff . . . how benefits, vacations, early retirements and how things of that nature would be handled." According to Lambertson, St. Ledger advised the unions that "it was not a permanent shutdown . . . it was what they call an extended layoff which was in accord with the contract. He said that was what they were calling it and that a section of the contract covered it." St. Ledger testified that the closing was an "indefinite layoff" being taken "to secure or interest another purchaser that would come in and operate the plant or supply funds to operate the plant." "By indefinite layoff I meant it was not known the duration of the layoff, I meant it was not known the duration of the layoff, because we did not know what was going to be the

outcome of seeking these other operators or other suppliers of funds.'"[8]

On the question of insurance, St. Ledger said an announcement would appear in the newspaper. On the question of severance pay, St. Ledger responded that "severance pay is not paid in an indefinite layoff until after a certain period of time." On the question of continuing pen-

8. On this same subject St. Ledger testified:

THE WITNESS: I told them that an indefinite layoff as defined in their contract for up to a period of six months and that what I was terming as an indefinite layoff is one in that we did now know what the future of the mill would be up to the end of that period.

JUDGE GOERLICH: When you say you didn't know what the future would be, did you elaborate on that?

THE WITNESS: Only in the respect that we did not—or I did not know of personal knowledge whom we had for prospective purchasers or anyone that might be willing to supply funds.

JUDGE GOERLICH: Well, in your discission with them did you indicate to them that the present management of Penntech would not continue to operate, but that if some other individuals came in that they would be the operators? Is that what you told them, or something along that line?

THE WITNESS: No, I don't think I stated it in that manner.

JUDGE GOERLICH: How did you state it to them?

THE WITNESS: Just that if Penntech—if someone would come in and supply funds, even through Penntech, that Penntech could possibly once again consider operating the mill.

JUDGE GOERLICH: In other words, if someone came in and underwrote, so to speak, Kennebec that it might continue to operate, is that what you told them?

THE WITNESS: Yes, sir.

* * *

JUDGE GOERLICH: Did you indicate to them that Penntech had decided not to further supply monies for Kennebec?

THE WITNESS: I can't recall the exact terminology, but I think that was clear to them.

JUDGE GOERLICH: That that was the situation?

THE WITNESS: That that was the situation.

Q. (Mr. Ohlweiler, resuming) Did you also state that efforts were being made or were going to be made to try to find a new buyer who might infuse funds into the company?

A. I did.

sion payments, St. Ledger answered, "I don't know." On the question of vacations, St. Ledger said, "It is an indefinite layoff and they cannot take their vacations at this time."

During the meeting St. Ledger was asked with whom the Unions could talk who exercised some authority. The answer was, "[T]he best thing you can do is talk to the attorneys of Penntech." The Unions were given their names and telephone numbers.

In respect to the mill closing St. Ledger informed the Unions that "[a]ll he knew was that he got a call and he was told to bring in people and tell them that the mill was to be down in an orderly—hopefully, an orderly shutdown by three o'clock on the 29th."

On April 10, 1977, Local 559 filed a grievance which cited contract violations involving vacations, pensions, and severance pay. In the statement of facts appears:

> At a meeting on April 4, 1977 with Mill Manager, Bruce St. Ledger and John McLeod and representatives of Local #559 the above-named management would not furnish the union with any information in respect to the company's contractual obligation for payment of earned wages and other benefits.

Richard McQuarrie, president of Local 559, explained that he had tried to obtain information from McLeod by phone as to the matters raised in the April 4 meeting for about 3 or 4 days thereafter without success, whereupon McQuarrie prepared the grievance.

After the mill closed the boiler and powerhouse remained in operation. In the meantime trucks continued moving certain materials and items from the mill premises.[9] Certain leased property was also removed.

9. At the time Maine Guarantee Authority held a first mortgage but it did not include "current assets or inventory or accounts receivable or motorized vehicles."

As noted above unfair labor practice charges were filed on April 11, 1977. On April 21, 1977, the District Judge for the United States District Court for the District of Maine, Northern Division, granted a temporary restraining order enjoining the removal of certain property from the mill premises.

On April 22, 1977, St. Ledger and McLeod met again with the Unions' representatives. Lambertson was again the Unions' spokesman. Minutes were taken at this meeting by both the parties. This meeting followed a letter dated April 19, 1977, in which St. Ledger wrote:

> If you would like to meet and discuss with us this matter [request for arbitration], or the effects of any future decision to permanently close the plant, or any other related matter, please so advise us and we shall be pleased to meet and confer with you. [G.C. Exh. 2.]

At the meeting the Unions asked for information on the status of vacation pay, severance pay,[10] and pensions. St.

10. The contract provision for severance pay is as follows:

25. SEVERANCE PAY

Employees who are permanently laid off by Company action due to a relocation of all, or substantially all of the Company's operations to a new location one hundred or more miles from the present location, or, as a result of substantial cessation of the company's operation, shall receive severance pay as follows: One day of straight time pay for each year of continuous service after three years of continuous service.

Severance pay shall not be paid under the following circumstances:

1. When relocation or termination is necessitated by a physical calamity such as fire, flood or other natural disasters.
2. In compliance with the final order of any federal, state, or local government agency, including an adjudicated bankruptcy.
3. When the employee accepts employment at the new location.
4. When the employee has been employed by the company for less than three years.

Ledger stated that no vacation or severance pay would be allowed during the indefinite layoff. St. Ledger also stated that early retirement would not be allowed. St. Ledger was not sure on the subject of pensions but said that they expected to pay pensions the next month as it had paid the last and that insurance for the retirees was being carried by the mill.

St. Ledger was asked whether the mill was going down. He answered that Penntech was in touch with "people in the hope to start up." (G.C. Exh. 7.) The Unions' minutes reveal:

> Boiler house and power house will be down at 3 a.m. today. People were working in the plant for removal of equipment and Broke. Injunction halted that. The plant could start in less than a month. Penntech still holds the lease. The decision to close the boilers and powerhouse made by me. Also said several times, "I have no new information." [G.C. Exh. 5.]

During the meeting St. Ledger reiterated that the closing was an indefinite layoff. Union representatives queried how this could be when "they were moving stuff out." According to the Unions' minutes St. Ledger said, "I am still working for Penntech. I have no answers. I take my orders from Penntech." (G.C. Exh. 5.)

St. Ledger was also asked whether he had an answer to Local 559's grievance. He stated that he had no answer at the present time but would let Local 559 know at the time limit for answering the grievance. After the meeting adjourned, the Unions' representatives returned and asked St. Ledger and McLeod whether the Local 559 grievance could be expanded to include the other locals. They agree [*sic*] to accept a combined submission of the grievance. Thereafter the Unions' attorney handled the grievance. On December 4, 1978, the Unions advised the National Labor

Relations Board that it was no longer pursuing arbitration of the grievance. Withdrawal of the arbitration was accomplished in June 1979.[11]

According to Lambertson the last information the Unions received on the subject of plant closure was in the April 22 meeting; to wit: "We don't know at this time. All we can tell you is for all intents and purposes it is an indefinite layoff." The parties never met again after April 22. Thereafter Lambertson phoned St. Ledger two or three times as to the "status of everything." St. Ledger's response was "I don't know." Lambertson testified that "there was no necessity to meet. This is what we were told by Mr. St. Ledger. . . . He said that he didn't have anything new." St. Ledger resigned in August 1977.

St. Ledger testified that by the "end of July, first of July" 1977 it was "obvious then that the mill could not be restarted within that period of time [6 months]." At this point of time St. Ledger said that he did not contact the Unions. He explained, "When the union left me they said that they did not want any further meetings; that they were not satisfied with the answers I was giving them and they were going to pursue it in another manner." "And I did not contact the union."[12]

The Madison Paper Company is presently operating the mill. A substantial number of Kennebec employees were hired by this company.

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11. By a letter dated May 27, 1977, the Regional Director administratively deferred proceedings on the Unions' charges pursuant to *Dubo Manufacturing Corporation*, 142 NLRB 431 (1963). The Regional Director revoked his deferral letter on December 4, 1978.

12. On April 25, 1977, an unfair labor practice charge was filed for the refusal by Kennebec to provide information in respect to the pending arbitration proceedings. A complaint was issued. The matter was continued *sine die* pending compliance by Kennebec with an agreement to produce the information. On December 15, 1977, the complaint was dismissed upon the Unions' request of withdrawal of the unfair labor practice charge.

Third: The litigation in the District Court which was commenced by the Unions in April 1977 against the Respondents after trial came on for decision by the United States District Court of Maine, Northern Division, on October 21, 1971. The defendants in such action were Kennebec, Penntech, T.P. Property, and Maine Guarantee Authority. The plaintiffs were the Unions herein. The court defined the issue as "whether Penntech Papers, Inc., which was not a signatory, can be ordered to arbitrate certain provisions of a collective bargaining agreement entered into between the plaintiff unions and the defendant Kennebec." (Jt. Exh. I(v).) The action was brought pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 USC § 165. The court found against the plaintiff Unions on the issue. *United Paper Workers International Union* v. *Penntech Papers, Inc.*, 439 F.Supp. 610. The Unions appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals affirmed the District Court. The Unions did not appeal the Court of Appeals' decision. A stipulation of dismissal was filed in the District Court on or about July 3, 1979, in which the parties pursuant to Fed. R. Civ. P. 41(a)(i)(ii) dismissed "the instant actions with prejudice." (Jt. Exh. 2(p).) As noted above the Unions withdrew their demand for arbitration and the Regional Director issued the within complaint on January 23, 1979.

The claims under the contract which were the subject of the arbitration demand remain unsettled and unpaid.

Fourth: The General Counsel and the Charging Parties contend that the Respondents failed and refused to bargain in good faith with the Unions concerning the effects upon employees of the decision to terminate operations of the Kennebec mill in Madison, Maine. The Respondents insist that the General Counsel has failed to prove a violation of Section 8(a)(5) of the Act "since the evidence demonstrates that the Unions failed to request negotiations as such, and the Respondent Kennebec, in full satisfaction of

its responsibilities, met with the Unions when requested and answered all questions asked by the Unions regarding contract benefits and all other matters raised by the Unions." (Resp. br., p. 25.)

From the record evidence it is clear that the termination of Kennebec's operations on March 29, 1977, and the separation of its employees from employment occurred without notice to or affording the Unions an opportunity to bargain in regard to the effects upon the employees of the Respondents' decision under such circumstances as would have allowed the Unions a reasonable time in which to bargain prior to closing. In failing in this respect the Respondents violated Section 8(a)(5) of the Act even though the Unions made no request to bargain about the closing prior to March 29, 1977. *Ozark Trailers, Incorporated and/or Hutco Equipment Company and/or Mobilefreeze Company, Inc.*, 161 NLRB 561 (1966). As in such case "the Union, during the most critical period, at the very time when bargaining would have been the most productive, was completely unaware of Respondents' intention to close the Ozark plant permanently." 161 NLRB at 564. Indeed, as of the present time there is no credible evidence that the Respondents have ever informed the Unions that the Kennebec mill is actually closed. Nevertheless, the Respondents contend that the Respondents fulfilled their duty by responding to the Unions' questions regarding certain claims raised at the April 4 and 22, 1977, meetings. In other words, the Respondents rely upon their conduct at those two meetings as absolving them from a refusal to bargain in good faith about the effects of the mill's closing.

On the other hand the General Counsel asserts that the Respondents' good faith was wanting in that the notice of closing was withheld from the Unions in order to deprive them of "an opportunity to bargain over the effects of the decision while they maintained a semblance of an equality

of bargaining power." In any event, this obviously was the effect of closing the mill without notifying the Unions. Such inference also obtains since the credited record discloses no emergency circumstances which would have justified the Respondents' precipitant action. Indeed the Respondents considered and rejected the idea of contacting the Unions in regard to the closing.

The General Counsel also maintains that the Respondents acted in bad faith when "no responsible officials of Penntech were present during the April 4 and 22 meetings." In this respect St. Ledger disclosed his very limited authority when he referred the union representatives to Penntech's attorneys in New York. His bargaining authority was insufficient to satisfy the requirements of bargaining in good faith. Cf. *Pepper & Tanner, Inc.*, 197 NLRB 109 (1972).

The General Counsel next contends that the Respondents "denied the Unions an opportunity to engage in meaningful bargaining by making false and misleading statements concerning the future of continued operations of Kennebec." This point seems to be well taken. St. Ledger claimed the closing was an "indefinite layoff" and that the possibility was that Kennebec would resume operations by the infusion of new money or through a purchaser. McLeod's letter of March 30, 1977, asserts the opposite; to wit, ". . . we cannot see any possibility of Penntech resuming operations nor can we see the purchase or operation of the company by any other firm. . . ." (C.P. Exh. 1.) Moreover, the records of MGA reveal that at a special meeting on April 11, 1977, it was voted:

> (1) That the Manager is authorized to seek an agreement relative to the surrender of the premises by the present tenant, Kennebec River Pulp & Paper Company, Inc., and the assumption of lawful possession by the Maine Guarantee Authority and/or the Trustee,

and, (2) That the Manager is directed to request the Trustee, Merrill Trust Company, to declare a default under the bond indenture and to initiate foreclosure proceedings. [G.C. Exh. 25.]

Additionally, it was noted:

That the Manager is authorized to enter into an agreement for a period not to exceed 60 days with William Anderson, former production manager of Kennebec River Pulp & Paper Company, Inc. and Arthur Lehto, former plant engineer for Kennebec River Pulp & Paper Company, Inc. for the purpose of maintaining the Kennebec mill. It is understood that the roles of Mr. Anderson and Mr. Lehto will be those of technical advisors, maintenance supervisors and directors of plant security. [G.C. Exh. 25.]

With the occurrence of these events the Respondents must have known that Kennebec, having been deprived of Penntech's resources, had no chance of resuming the operation of the mill. Ford testified that one might draw the conclusion that Kennebec, "as a corporation, to a stock purchaser was virtually unmarketable because of the long term debt situation the corporation faced and its other obligations."[13] Ford observed "what happened was is that the MGA foreclosed, took possession of the asset involved —that is the mill, and sold that to somebody else. And, Kennebec is still sitting there with its indebtedness." According to Ford the buyer from MGA declined the opportunity to purchase Kennebec stock.

Under these circumstances it is clear that the Respondents, as reasonable and knowledgeable members of the business community, on April 24, 1977, when St. Ledger was insisting that the mill closing was an indefinite layoff, knew

13. Kennebec owed Penntech $3 million.

that there was no chance of Kennebec reopening the mill or disposing of Kennebec stock as a going concern. Kennebec was a corporate shell full of liabilities and few assets. Indeed, Penntech immediately commenced removing the assets (which St. Ledger told the union representatives belonged to Penntech) from the shell when the mill was closed. St. Ledger's statement that the closing was an "indefinite layoff" was a gross misrepresentation and constituted bad-faith bargaining.

St. Ledger's responses to the union representatives and his take-it-or-leave-it attitude[14] were the antithesis of good-faith bargaining. Because the Respondents failed to notify the Unions of the closing, failed to cloak their negotiator, St. Ledger, with sufficient authority, misrepresented the nature of the closing, and adopted a take-it-or-leave-it attitude which foreclosed a good-faith exchange of ideas, the Respondents did not bargain in good faith over the effects of the closing of Kennebec and are guilty of a violation of Section 8(a)(5) and (1) of the Act. The Respondents failed and refused to bargain in good faith concerning such bargainable matters as severance pay, pension, and vacation benefits, among others, which was their duty.[15] The Unions were given a brushoff. Indeed, the Unions were never informed by the Respondents that Kennebec mill was ever closed.

Fifth: The Charging Parties contend that by failing to bargain over their decision to close Kennebec the Respondents violated Section 8(a)(1) and (5) of the Act.[16]

The credited facts in this case disclose that the Respondents experienced production problems and losses through-

14. St. Ledger was quoted as saying, ". . . this is the way it is and this is the way it is going to continue until further notice."

15. The facts in the instant case distinguish it from cases cited by the Respondents.

16. Whether a violation on this issue should be charged against the Respondents will be considered *infra*.

out their entire operation of the Kennebec mill. While Penntech had sought and obtained modification of Kennebec's labor agreement satisfactorily for its assumption of the operation of the mill, the Respondents did not again approach the Unions for either assistance or suggestions in regard to their operation of the mill except for Leslie's blast in November 1976 which, of course, was not a notice to close the mill. On this occasion the Unions were given no opportunity to respond. Although between November 1976 and March 1977 Leslie's goals set for the mill were not reached, the Respondents neither advised the Unions during these 4 months of a likely mill closure nor suggested that the Unions bargain in respect to such a prospect. Moreover, the Respondents had ample time to notify the Unions of the shutdown prior to their unilateral announcement of the closing. The closing was not based on some sudden or unanticipated situation which required immediate action. Why the Respondents avoided raising the problem with the Unions finds no valid explanation in the record unless the date was chosen to accommodate the completion of the real estate deal above mentioned. St. Ledger's weak retort as to why March 29, 1977, was the date chosen for the shutdown day manifests a certain callousness and a disregard of the Respondents' employees' interests; i.e., "there was no reason for prolonging it. The decision had been made, and there was no point in having rumors circulated." By presenting the Unions with a *fait accompli* the Respondents foreclosed and prevented them from suggesting a possible remedy for the Respondents' predicament or from participating in the implementation of the timing of the closing so that the impact would not have fallen so harshly on the employees. The problems on March 29 were no different and were of the same kind which had existed for several months. If there were an urgency for action it did not first emerge on March 29. Indeed, had the Respondents chosen to bargain with the Unions prior

to March 29, they would have been in no way hampered in exercising their decisional prerogatives nor would their entrepreneurial control have been surrendered for, having bargained in good faith with the Unions, they could have taken such action as they deemed provident.[17] The economic factors existing prior to the Respondents' closure of their Kennebec mill were not of such urgent moment as to overcome the presumption in favor of the duty to bargain. Collective bargaining in advance of the closure might well have produced a union offer which would have persuaded the Respondents to continue to operate the mill. As was stated in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 213 (1964), "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." The Court further said: "[A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

Thus the Respondents clearly frustrated the congressional purpose by unilaterally closing their Kennebec mill and foreclosing a chance to modify the decision to close which not only may have preserved jobs for the employees but also might have continued a payroll in the community. Sound public policy cannot look askance at such a salutary effect.

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17. The Board said in *Brockway Motor Trucks, Division of Mack Trucks, Inc.*, 251 NLRB No. 23 (1980):

> . . . we must not lose sight of the minimal burden that a duty to bargain places on an employer. Rather than impinge on an employer's freedom to manage its business, bargaining over a partial closing simply requires the employer to discuss the matter at the bargaining table, and may even benefit the employer by obviating the need to close. Should the parties fail to reach agreement the employer is free to implement its plan to close the plant.

In the case of *Brooks-Scanlon, Inc.*, 246 NLRB No. 76 (1979), the Board said, "We recognize that in past cases the Board has consistently found that an employer has an obligation to bargain about decisions involving subcontracting, plant removal, and partial closure. The purpose of this requirement is to afford the union an opportunity to propose alternative measures which might alleviate the need for the elimination of unit jobs."

The record, which contains a full treatment of the closure issue, presents no valid reason why the Respondents should be excepted from the obligation to bargain in respect to the closing of the Kennebec mill. The situation is no different in effect from the case of *Royal Typewriter Company, etc.*, 209 NLRB 1006 (1974), in which the Board found a duty to bargain in respect to the closing of one of the respondent's subsidiaries. In that case, referring to Board precedent, the Board stated that the Board has held that "an employer operating two or more plants was obligated to bargain with respect to a decision to close one of those plants." 209 NLRB at 1012. Here the Respondents operated mills at Johnsonburg and Madison. Accordingly, it appears that the Respondents by failing and refusing to bargain in respect to the closing of Kennebec mill were in violation of Section 8(a)(1) and (5) of the Act. See also *National Car Rental System, Inc.*, 252 NLRB No. 27 (1980), and *Brockway Motor Trucks, Division of Mack Trucks, Inc., supra.*

Additionally, through St. Ledger the Respondents admitted that the alleged indefinite layoffs ripened into a permanent closing by the end of July 1977. If the permanent closing occurred at this time the Respondents again avoided their bargaining duty. Thus, whatever date is resolved as the permanent closing date it is clear that the Respondents have refused to bargain not only in respect to the effects of the closing but also in respect to the decision to close.

What was stated by the Board in *Brockway Motor Trucks, Division of Mack Trucks, Inc., supra,* is apposite here, ". . . we conclude that the evidence here shows that Respondent's freedom to manage its business and determine the direction of its enterprise would not have been impaired had it bargained with the Union over the decision to close . . . ."

IV. The Charging Parties' Motion To Amend the the Complaint To Conform With the Proof

At the conclusion of the General Counsel's case, counsel for the Charging Party stated:

> Well, it was my conclusion as a result of the completion of the General Counsel's case, the charging party's case, back in September of 79, that the record demonstrated that this company had not only failed and refused to bargain over the impact of the closing of the plant, but they had in fact also failed and refused to bargain over the decision to close and I ask that the amend—the complaint be amended to embrace the evidence in the case to the extent that it also establish that the company failed to bargain over the decision to close.
>
> * * *
>
> —I move that the complaint be amended to embrace the evidence in the case to that affect [sic], and I believe that your Honor has the authority to grant the motion. In any Court of Law, it's customary to move that the complaint be enlarged to embrace the evidence, but General Counsel did not join me in that application but felt that it should go through the bureaucratic process of the Board which I did, without any success, but my position is still the same and that is that the complaint should be amended to embrace all the evidence before this Court—before this Board.

The motion of the Charging Parties was not ruled upon during the hearing. In *GTE Automatic Electric, Inc.*, 196 NLRB 902 (1972), the Board said: "The authority of the Trial Examiner to amend the complaint under Section 10(b) of the Act is clearly limited to those instances where the amendment is sought or consented to by the General Counsel, or *where evidence has been received into the record without objection.*" (Emphasis supplied.) In the instant case the evidence which supports a finding that the Respondents refused to bargain over the decision to close Kennebec mill was offered by the General Counsel, obviously without his objection. Much of it was introduced as joint exhibits and enough evidence is uncontroverted to support a finding that the Respondents refused to bargain with respect to the decision to close Kennebec mill. Thus it would appear under these circumstances that an administrative law judge may exercise jurisdiction to grant or deny an amendment to the complaint to conform the complaint to the proof even though the General Counsel is construed to control the complaint. In this respect an administrative law judge exercises a judicial function which does not obtain to the General Counsel as the prosecutor. As was said in *The Frito Company* v. *N.L.R.B.*, 330 F.2d 458, 465 (9th Cir. 1964):

> Once having elected to prosecute a complaint before the Board, the General Counsel is cast in the role of prosecutor in a judicial proceeding. His authority as a prosecutor is not reviewable by the Board, but this authority does not extend to control of the proceeding itself. ***He cannot limit the scope of the decision which may be rendered upon the evidence adduced. It is a judicial function to permit an amendment of the complaint to conform to proof admitted without objection.*** The matter of allowance of such an amendment is addressed to the discretion of the court.
>
> ***The proof having been admitted without objection, what is to be done with it is no longer a part of the***

prosecution of the cause. A ruling by the Board adverse to the wishes of the General Counsel is not a review of a decision of the General Counsel. *In the prosecution of the complaint he could have objected to the introduction of the evidence. He did not do so and he thereby consented to the introduction of the issue to which the evidence was addressed.* The trial examiner and the Board were then free to consider the evidence and to exercise judicial discretion as to whether to permit amendment to conform to proof.

On the matter of amendment to conform to proof admitted in the record, especially if amendment may be necessary to enable the Board to effectively discharge its duty to declare policy, we hold that the Board does have the authority to allow an amendment over the objection of the General Counsel and that this is a judicial function rather than a review of a decision of the General Counsel in the course of the discharge of the duties of a prosecutor over which he has final authority.

The Board could adopt the view of its trial examiner, it could dismiss the case for public policy reasons, or it could render a decision based upon the issues actually tried without ordering amendment to conform to proof or conduct further hearings in the premises. [Emphasis supplied.]

The Charging Parties' motion to amend the complaint to conform with the proof is granted.

Having offered evidence on the issue it is not within the province of the General Counsel's prosecutorial power to foreclose the exercise of the Board's judicial power to pass on the issue. There appears to be nothing in the Act which reveals a congressional intent to lodge power in the General Counsel to close the Board's eyes to an unfair labor

practice appropriately brought to its attention in a record before it composed in conformity with the statute's procedures. "The Board was created . . . to advance the public interest in eliminating obstructions to interstate commerce. . . ." *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 307, 308 (1959).

Even though the charging party's motion was not granted, the Board has said in the case of *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955), "It is well established that when an issue relating to the subject matter of a complaint is fully litigated at a hearing, the Trial Examiner and the Board *are expected to pass upon it* even though it is not specifically alleged to be an unfair labor practice in the complaint." (Emphasis supplied.) See also *Rochester Cadet Cleaners, Inc.*, 205 NLRB 773 (1973); *Crown Zellerbach Corporation*, 225 NLRB 911, 912 (1976); *National Family Opinion, Inc.*, 246 NLRB No. 84, sec. II,E,1 (1979).

In the instant case the issue of the refusal to bargain concerning the decision to close and the effects of the closing on the employees is related both to the allegations of the complaint and the charges.[18]

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18. See *N.L.R.B.* v. *Inland Empire Meat Company*, 611 F.2d 1235 (9th Cir. 1980), citing *N.L.R.B.* v. *Central Power and Light Co.*, 425 F.2d 1318, 1320 (5th Cir. 1970).

The court pointed out in *Inland Empire Meat Company, supra*, that the violation alleged in the complaint which was not specifically contained in the charge was "covered by the general language (i.e., 'other acts and conducts') of [the] charge." The same is true in the instant case for the charge contains this language:

> By the acts set forth in the paragraph above, and by other acts and conduct, it, by its officers, agents and representatives, interfered with, restrained, and coerced, and continues to interfere with, restrain and coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act.

In *Gulf States Manufacturers, Inc.* v. *N.L.R.B.*, 579 F.2d 1298, 1302-03 (5th Cir. 1978), the court said that the "'catch-all' phrase 'by other acts and conduct' in the charges was sufficient to include other acts and conduct if they are sufficiently related to the specific acts alleged."

Each are 8(a)(5) violations which stem from the Respondents' closing of Kennebec mill on March 29, 1977.

In the case *M & J Trucking Co., Inc.*, 214 NLRB 592, 597 (1974), a finding of an unfair labor practice was entered although the misconduct was not specifically alleged in the complaint and at the hearing the counsel for the General Counsel acknowledged that he was not seeking a finding of a violation. The respondent was found not to be prejudiced by the counsel for the General Counsel's disclaimer, that the matter was fully litigated and that misconduct directly related to other specifically alleged unfair labor practices. The case of *Moore Feed Store, supra,* was relied upon.

The Board has said in *C & E Stores, Inc., C & E Supervalue Division,* 221 NLRB 1321, fn. 3 (1976): "It is well established that where, as here, the facts underlying the violation are fully developed at the hearing, an unfair labor practice finding can be based on the issues litigated as well as those specifically alleged in the complaint." Relying on this Decision the Board has held that it is not precluded from finding a violation under an alternative theory although the complaint alleged a different theory of the case. *Illinois Bell Telephone Company,* 251 NLRB No. 128 (1980).

Since the events surrounding the closure of the Kennebec mill and the failure and refusal of the Respondents to bargain over the decision to close were fully litigated and the refusal to bargain over the decision to close was intimately related to the subject matter of the complaint and the charge, as noted in *Monroe Feed Store, supra,* an administrative law judge and the Board are "expected to pass upon it even if not specifically alleged to be an unfair labor practice in the complaint." And this is true even though the General Counsel is not pressing a finding on the issue. *M & J Trucking Co., Inc., supra.* "The Board may properly find an unfair labor practice when the issue has been fully litigated even though not specifically pleaded in the complaint. . . . The Board may either render a decision

upon the issues actually tried or order an amendment to conform with the proof." *N.L.R.B.* v. *International Association of Bridge, Structural and Ornamental Iron Workers, Local 433 [Associated General Contractors]*, 600 F.2d 770, 775 (9th Cir. 1979). See also *Ackerman Manufacturing Company*, 241 NLRB No. 106 (1979), in which the Board reversed the Administrative Law Judge, opining ". . . inasmuch as Atkins' testimony concerning this incident was uncontroverted and fully credited, and because the matter is closely related to the subject [matter] of the complaint, we shall find the 8(a)(1) violation and provide an appropriate remedy."

Hence it is incumbent for the Board to enter a finding that the Respondents violated Section 8(a)(5) of the Act by failing and refusing to bargain in respect to the decision to close the Kennebec mill. As said in *The Frito Company* v. *N.L.R.B.*, 330 F.2d at 463: "The Board cannot fulfill its obligation to uphold the purposes of the Act if it conceives itself powerless to exercise an independent examination . . . of the case presented by the General Counsel."

The Respondents having committed the unfair labor practice ought not be held to complain because they do not come off scot-free.

The credited record is void of any proof that the Respondents either fulfilled their duty to bargain in respect to the decision to close Kennebec mill or the effects of said closing. Thus, unless it is found that Penntech, Kennebec, and T.P. Property are not a single employer, a finding must be entered against each that each was guilty of violations of Section 8(a)(5) of the Act.

In its conclusion the Charging Parties set this case in its proper focus:

> In a case as blatantly violative of the Act as this one, the relief provided should be the maximum permitted under the Act.

The Company unilaterally decided not to follow the agreed-upon contract terms. There was nothing the Union could do, since its leverage had been removed when the mill was closed.

The closing of the mill was carefully orchestrated. First the Company negotiated favorable terms with the MGA for $1,250,000; $750,000 of which went directly to Penntech as Kennebec paid off its obligations. As soon as the deal was final, T.P. recalled Kennebec's notes in anticipation of a closing. Twelve days later Penntech shut off funds—permanently. That same day the Company shut down the Kennebec mill. No notice was given to the employees so as to deprive the Union of bargaining power. At the same time, the Company stripped the mill of its assets. The closing was called a layoff to avoid the severance payment and the other contractual obligations of the Company in the event of shutdown. In less than a month, there was no one around for the Union to talk to.

The scenario went off like clockwork. And such purposeful avoidance by the Company of its duties under the Act cannot go unheeded. The employees are entitled to complete, make-whole relief. [C.P. br., p. 46.]

V. The Single-Plant Issue

The General Counsel and the Charging Parties contend that the Respondents Kennebec, T.P. Property, and Penntech constitute a single employer. The Respondents admit that Penntech is the sole stockholder of T.P. Property and Kennebec. The parties agree that the following facts are true.

Penntech and T.P. Property share the same corporate headquarters, 600 Third Avenue, New York, New York, on the 35th floor. The offices are not physically separate. The

title on the office door reads only "Penntech Papers, Inc." No portion of the office contains separate space for T.P. T.P. has no separate employees or furniture of its own. Penntech leases its corporate headquarters in New York City. T.P. is not a party to that or any other lease related to that property. Neither Penntech nor T.P. pay taxes in New York related to that facility. Both Penntech and T.P. pay franchise taxes to the State of New York. No T.P. officer is paid any salary by T.P.

T.P. does not employ legal counsel on a retainer basis. T.P. engages legal counsel to the extent it needs legal counsel and, in the past, such counsel has been the same as engaged by Penntech.

T.P. has not conducted regularly scheduled Board meetings. To date all of T.P.'s corporate formal decisions have been recorded as unanimous consents as permitted under Delaware law.

At the time of T.P. Property's acquisition of the Kennebec stock John Leslie, the president, chairman of the Board, and director of Penntech, was president and director of T.P. Property. William B. Ford, vice president of finance and secretary of Penntech, was a vice president and director of T.P. Property. According to Ford, T.P. Property was used by Penntech as the purchaser and holder of the Kennebec stock because Penntech was subject to an indenture which "had a number of restrictions on operations . . . it was easier for [it] to incorporate a separate subsidiary to make the acquisition itself, rather than to do it directly through Penntech."

Thus T.P. Property was used as a funneling vehicle through which Penntech money was channeled in to Kennebec's operations. Accordingly, as claimed by the General Counsel, T.P. Property was an *alter ego* of Penntech.

After the Kennebec stock acquisition the directors of Kennebec became John Leslie, William B. Ford, and Robert S. Malina, and Leslie (according to Ford) designated

Allen J. Nadeau as president, William B. Ford as vice president, secretary and treasurer, Steven B. Bittel, as corporate controller, and Fred C. Scribner, Jr., as clerk. Except for the clerk attorney all of the above were associated with Penntech.

After assuming their duties with Kennebec, Ford and Bittel retained their positions with Penntech. Of Nadeau, Ford testified, "Mr. Nadeau continued in the capacity at Penntech as a director of the company and as a vice president of Penntech. But the vast majority of his time, his responsibilities, involved managing Kennebec River Pulp and Paper Company." Bill Picard, who had been mill manager at Penntech in Johnsonburg, Pennsylvania, was asked to assume a similar position at Kennebec; he ceased all his responsibilities with respect to Penntech and spent full time with Kennebec. Picard was replaced by St. Ledger in June 1976. In February 1977 St. Ledger was named president of Kennebec. Although Nadeau remained president of Kennebec until replaced by St. Ledger and as such was the "chief operating officer" of Kennebec, from mid-December until the end of his tenure as mill manager St. Ledger reported directly to Leslie per his instructions. Fred C. Scribner, Jr., was replaced by Robert E. Stevens and Stephen D. Weinroth was added as a vice president. Weinroth was vice president, secretary, and director of T.P. Property. Since February 1977 directors have been Leslie and Ford. Malina resigned. According to Ford the functions of the board of directors were "strictly nominal."

Although Leslie filled no office with Kennebec other than as a member of the board of directors it is clear that he, in his capacity with Penntech, was the moving force behind Kennebec. Leslie followed the affairs of Kennebec "very closely" and actively engaged in its operations. He initiated the idea of using sludge in Kennebec's papermaking process and insisted that the idea be put into effect. He allowed or disapproved capital expenditures. On Novem-

ber 19, 1976, he convened department heads and union representatives in a group and warned them that production must increase or the mill would not be "viable for continued operation," and that "Kennebec . . . was not going to drag Penntech with it." (See *supra.*)

Leslie participated in discussions which "involved affairs having to do with personnel relations at Kennebec River Pulp and Paper Co." Ford and McLeod were present in these discussions. One of these meetings, according to Ford, concerned "developing means of improving production in the mill."

Finally, Leslie cut off Kennebec's funding and closed the mill.

Charles W. Anderson, who had been Kennebec's "marketing manager," was contacted by Penntech personnel prior to the stock acquisition. Jack Dodge, vice president of marketing sales of Penntech, invited Anderson to Penntech's New York office "to pass on to the Penntech sales force the pertinent details about Kennebec from a sales standpoint" and "to instruct or educate . . . the Penntech salesmen in marketing and selling of ground wood papers." In January 1977 Dodge "made it very clear" to Anderson that if Penntech "purchased" the Kennebec mill Anderson would be hired.

Anderson also visited the Johnsonburg mill with Dill Paiste, the production manager of Kennebec, when the mill closed and discussed scheduling mechanics of production at Kennebec with Penntech personnel. Anderson also met with Nadeau during which meeting the Kennebec labor agreement was reviewed line by line. Comments were made by Penntech representatives such as ". . . we can live with this or we can't live with that."

Anderson testified that, when his employment ceased with Kennebec mill in March 1977, after the mill's closure his settlement check was drawn on T.P. Property.

Kenneth Smith was employed by Kennebec mill in charge of production scheduling before the 1975 shutdown. Smith and Anderson about the time of the Kennebec stock acquisition traveled to Johnsonburg mill and met with Dodge and Jim Nestlerod, Penntech's marketing manager. Dodge offered Smith employment similar to that which he had performed for Kennebec before the mill was closed in 1975. Smith explained:

> Jack Dodge had made up an extensive booklet on what the chain of command would be. I was at the bottom. I was the customer service man at Kennebec in Madison. Louis [Wolf] was the customer service manager for Kennebec and Johnsonburg. Jim Nesselroll [sic] was the marketing manager who was my boss. And then of course Jim answered to Jack Dodge who was the vice president for marketing.
>
> Also on that plan it told how the orders would be made up. Louis had—took all the orders at Johnsonburg. The orders were typed and sent up to me, and it was up to me to make distribution, figure trims, keep track of production and shipping figures, and make sure those were sent out by teletype to Johnsonburg.

Smith received his orders from Johnsonburg through Louis Wolf. Each morning Smith gave Wolf "a report of production and shipment." Wolf was the customer serviceman at Penntech's Johsonburg plant.

Smith spoke to Wolf every morning, giving him a report of production and equipment. Smith and Wolf maintained identical running schedule boards so that production could be coordinated over the telephone. Final authority for scheduling matters was vested in Penntech personnel in Johnsonburg.

Elmer C. Bragg, at the time of the acquisition, was a purchasing agent of Kennebec. He was introduced by Nadeau to Bill Detwiler, purchasing director of Penntech,

as his boss. Bragg took orders from Detwiler who appeared at the Madison mill every other week for 3 or 4 days.

Purchase orders were "okayed" by Penntech. Purchase orders carried printed thereon "Ship and Invoice to Penntech Papers, Inc. c/o Kennebec River Pulp and Paper Company, Madison, Maine." Penntech through its advertisements offered "Penntech's Pennbrite Board" and "Kennebec's DynaBond" bond papers. The contact was C. J. Stone, Business Papers Manager, Penntech Papers, Inc., New York, New York.

Supervisory and rank-and-file employees from the maintenance department at Penntech's Johnsonburg mill were utilized in Kennebec maintenance and engineering work both after the start of Kennebec mill in 1977 and thereafter while the mill was in operation.

Computations for the wages and salaries for the hourly bargaining unit employees were made by the main computer in Johnsonburg based upon information from the timecards punched into the computer by Kennebec personnel. Continuation sheets were prepared by the main computer in Johnsonburg. Kennebec's W-2 forms were mailed to employees in Penntech Papers, Inc. envelopes from Johnsonburg.

The collective-bargaining agreement effective by its terms from November 1, 1976, to June 30, 1977, which was in effect when the Kennebec mill was closed was unacceptable to Penntech. Negotiations for modifications were conducted between Martin and McLeod and representatives of the Unions. Through the efforts of Martin, who told union negotiators that he was negotiating for Penntech,[19] the labor agreement was modified to the liking of Penntech. The Unions accepted the modifications because Martin as-

19. During the negotiating sessions Martin stated that "Penntech was in a hotel room some place and he was more or less going back and forth with them to decide on this agreement."

serted that Penntech would not take over the operations of Kennebec mill unless they accepted the proposed modifications.[20]

The modified contract was executed on March 1, 1976. After the acquisition on March 3, 1976, Martin was replaced as president and manager of Kennebec by Allen J. Nadeau, a vice president of Penntech. While Nadeau's name appeared typewritten on the contract he did not sign the contract until later.[21] In about 3 weeks Kennebec mill commenced operations under the conditions of employment set by Penntech in the modified contract executed March 1, 1976.

In the letter dated July 29, 1977, from Provident Life and Accident Insurance Company to Richard J. McQuarrie it was stated, "Ms. Georgie Penrose, the Treasurer of T.P. Property Corporation and T.P. Property has agreed to extend the conversion period [for life insurance for Kennebec employees] to August 20, 1977." (G.C. Exh. 8.)

Manager of Industrial Relations McLeod in a letter dated February 17, 1977, used the words "*before*" Penntech purchased Kennebec." [*sic*] (G.C. Exh. 9.)

The Home Insurance Companies on a check dated October 6, 1977, to Francis J. Goodwin listed the insured as "Penntech Paper Company (Kennebec River Pulp and Paper Co.)." (G.C. Exh. 13.) The same was true on a check to Leo P. Veilleux dated September 23, 1977.

A letter directed to retirees dated April 4, 1976, from William A. Henry, controller, used the language, "Kennebec has been purchased by Penntech Papers, and paper production was resumed on March 27." (G.C. Exh. 15.)

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20. Martin was quoted as saying "that this is an agreement that Penntech wants in order to start up the paper mill again. If we don't accept it they would not further negotiate the sale of the State of Maine, MGA."

21. Upon inquiry by union representatives they were told that Nadeau was a vice president of Penntech.

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In a letter dated March 30, 1977, addressed to George W. Lambertson, International Representative, United Paperworkers, Manager of Industrial Relations McLeod used language, "[W]e cannot see any possibility of Penntech resuming operation." In the meetings between St. Ledger and union representatives after the mill's closure on March 29, 1977 (see *infra*), St. Ledger indicated that he was in the employ of and was representing Penntech.

According to Ford, Penntech was "financing the on going operation at Kennebec via advances." Penntech did all of Kennebec's purchasing and paid the suppliers directly when the credit terms were due. Penntech billed Kennebec for such purchases at "the time Kennebec actually used the equipment itself or material or supply." The changes [*sic*] were made at cost.

According to Ford, "all of the customers for paper manufactured at Kennebec Pulp and Paper Company were Penntech customers and were billed by Penntech while Kennebec River Pulp and Paper Company had only one customer, namely Penntech Papers. . . . the sales flow went through T.P. Property as the intervening subsidiary for the reason I explained earlier. But it was passed on up to Penntech." Penntech allowed Kennebec immediate credit for products shipped. Penntech carried the accounts receivable and sold the products. Penntech covered Kennebec's losses by general advance.

Picard, who was employed as Kennebec's manager, remained on the Penntech payroll in order to avail himself of certain benefits. Picard's salary and benefits were charged to Kennebec. St. Ledger was also carried on the Penntech payroll; his salary was charged to Kennebec. Ford and Weinroth were on the Penntech payroll, but the work they performed for Kennebec was charged to Kennebec. Apparently the work Leslie performed for Kennebec was not charged to Kennebec. Ford testified that Leslie had the

authority to discharge him and while working for Kennebec he considered Leslie his "boss."

In the case of *Radio and Television Broadcast Technicians Local Union 1264, etc.* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), the Supreme Court in affirming a "single employer" holding said:

> The controlling criteria, set out and elaborated in Board decisions, are interrelations of operations, common management, centralized control of labor relations and common ownership.

In reviewing the Supreme Court's decision and other authorities, the U.S. Court of Appeals for the District of Columbia said in *Local No. 627, International Union of Operating Engineers, AFL-CIO* v. *N.L.R.B.*, 518 F.2d 1040, 1045 (1975), affd. 425 U.S. 80 (1976).

> From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present . . . .

In *N.L.R.B.* v. *Big Bear Supermarkets No. 3*, 103 LRRM 3120, 88 LC ¶11,998 at 24,096 (9th Cir. 1980), it was stated along the same line:

> the presence of all four criteria [interrelation of operations, common management, centralized control of labor relations, and common ownership] of the single-employer test is not necessary to a finding of single-employer status; the ultimate question is whether there

is an absence of an arm's length relationship between the business entities in question.[22]

While the facts above detailed satisfy the criteria for a "single employer," a review of Leslie's activities provide [*sic*] the clincher.

Leslie was not an officer of Kennebec; thus, he could derive no power or authority from such source. His duties as a director of Kennebec were "strictly nominal" and obviously could not be exercised except in conjunction with other directors. Thus Leslie derived no power or authority from such office to personally administer Kennebec's affairs as if he were the chief operating officer. Nor is there any credible evidence that any action was ever taken by the board of directors of Kennebec giving Leslie the powers he exercised in connection with Kennebec's affairs. The board did not even approve or confirm Kennebec mill's closure. Nevertheless, Leslie exercised plenary power and authority over the affairs and operations of Kennebec.

St. Ledger, the president, and Ford, the treasurer and secretary of Kennebec, considered Leslie their boss as pertained to their duties for Kennebec. Leslie decided upon what capital expenditures could be made by Kennebec and determined manufacturing procedures to be followed, such as the use of sludge. He visited the mill and participated

22. The Circuit Court of Appeals for the Ninth Circuit has also said in *N.L.R.B.* v. *Don Burgess Construction Corporation, d/b/a Burgess Construction*, 596 F.2d 378, 384 (1979):

> However, no one of the factors is controlling, *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers* v. *N.L.R.B.*, 171 U.S. App. D.C. 102, 107-108, 518 F.2d 1040, 1045-46 (1975), *affd. on this issue sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976).

in meetings in which labor relations were discussed. He caused representatives of the Unions to be assembled, whom he warned to shape up or else. Finally, it was his decision which closed the mill. The power and authority which he exercised did not emanate from Kennebec. It was derived from his office as president and chairman of the board of Penntech. His intervention and administration of the affairs of Kennebec were the acts of Penntech through its agent, Leslie. Leslie provided common management and, together with the labor agreement insisted upon by Penntech, supplied a centralized control of labor relations. Common ownership and interrelation of operations are also apparent. The criteria being satisfied, accordingly it is found that the Respondents are a single employer or enterprise. See *Royal Typewriter Company, etc.*, 209 NLRB 1006 (1974).

VI. Whether the United States Court of Appeals Finding on the Single-Employer Issue Is Binding in This Action

The Respondents claim that the single-employer issue has been litigated and finally decided by the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit in an action brought by the Unions against the Respondent [*sic*] pursuant to the Labor Management Relations Act of 1947, as amended. The action in the District Court was to compel Penntech and T.P. Property to enter into arbitration with the Unions concerning certain provisions of a collective-bargaining agreement[23] between the Unions and Kennebec.

23. The charge filed by the Machinists on April 11, 1977, charges that Kennebec refused to bargain collectively with respect to "wages, severance pay, vacation pay, pension payments and vesting as well as other contractual benefits." The issue which was submitted to arbitration was "Failure of employer to pay its employees the wages, vacation pay, pensions, insurance and other entitlements due under the terms of the plan and termination of employment of the affected employees."

The collective-bargaining agreement was the same as offered in this case, bearing the execution date of March 1, 1976. The Court of Appeals defined the issue involved as "whether parent corporations should be bound to the collective bargaining agreements of their subsidiaries." (583 F.2d 33, 35).

The District Court drew its findings of fact from stipulated facts also a part of the instant record. The District Court found (which findings are the same as in the instant case):

> There can be no question but that Penntech, as sole stockholder of Kennebec, controlled it completely. The collective bargaining agreement was changed at Penntech's request. Penntech participated in the negotiations to write down Kennebec's debt. Penntech's attorneys were used by both corporations. The management of all three companies, Penntech, TP, and Kennebec, were so intertwined that the officers and directors of each would scarcely know when they were acting for one corporation or the other. [439 F.Supp. at 621.][24]

Nevertheless the District Court ruled that this integration was insufficient to supply an affirmative answer to the question: "Was Kennebec sufficiently integrated to satisfy the traditional test for determining when corporate entities must be disregarded." On the same set of facts the Court of Appeals found no basis to consider Penntech and Kennebec to be other than separate legal entities. Thus, the Court of Appeals failed to find that Penntech and Kennebec constituted a single corporation. The conclusion follows that the Court of Appeals also ruled that Penntech and Kennebec did not constitute a single employer.

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24. The facts appear to meet the criteria for a single employer as set forth by the Supreme Court in *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, supra.*

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The General Counsel in the instant case has raised the question (see discussion *supra*) whether Respondents Kennebec, Penntech, and T.P. Property do constitute a single employer. The answer to this question must be in the affirmative in order for Penntech and T.P. Property to be found guilty of the unfair labor practices alleged. Thus, for the General Counsel to prevail against T.P. Property and Penntech the ultimate finding must be that Kennebec and Penntech constitute a single employer. Since this claim was rejected on the same set of facts by the Court of Appeals, consequently it follows that, if the Board is bound by *res judicata* or collateral estoppel as claimed by the Respondents, T.P. Property and Penntech must be dismissed from this action.

As pointed out by the Respondents a voluntary dismissal with prejudice effected following the decision of the Court of Appeals " 'constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial.' " *Jamison* v. *Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976). In *Lawlor* v. *National Screen Service Corporation*, 349 U.S. 322, 327 (1955), the Supreme Court said, "It is of course true that the . . . judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action." Furthermore, in the same case the Court comments on the distinction between the doctrines of *res judicata* and collateral estoppel. Speaks the Court (*id.* at 326), "Thus, under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." It is the issue as to whether Penntech, T.P. Property, and Kennebec constitute a single

employer which the Respondents maintained was litigated in the District Court case and which the Charging Parties and the General Counsel seek to relitigate here. That issue obviously was litigated in the District Court.

The Respondents rely on *N.L.R.B.* v. *Heyman, d/b/a Stanwood Thriftmart*, 541 F.2d 796 (9th Cir. 1976). In this case the Board sought enforcement of an order based upon a finding that Thriftmart violated Section 8(a)(5) of the Act. The issue before the Court of Appeals was what effect the Board must give to a United States district court judgment which is antithetical to the Board's subsequent determination regarding the validity of a collective-bargaining agreement. As stated by the court, "The continued existence of a contract previously rescinded by the court was a premise of the Board's findings." (*Id.* at 797.) The question posed by the Court was "What consideration must the Board give the judgment of rescission."[25]

The court further commented: "In finding unfair [labor] practices, the Board declared that a contract, lawful on its face, raises a presumption that the contracting Union was the majority representative at the time the contract was executed." *Id.* at 798.

In establishing a duty on behalf of T.P. Property and Penntech to bargain in respect to the effects of the closing of Kennebec mill the General Counsel must likewise rely for the presumption of majority status on the contract between Kennebec and the Unions for no other proof of majority status was offered. The General Counsel alleges in his complaint: "Kennebec and the Unions executed final collective bargaining agreements on March 1, 1976." The Respondents admitted that Kennebec and the Unions have

25. The Board in *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22, 23, fn. 4 (1977), cited the issue as: "The issue was what effect the district court's rescission of a contract has on the Board's finding a presumption of majority representation based on that contract."

been parties to successive collective-bargaining agreements since 1970, the most recent one having been executed on March 1, 1976. The Respondents do not admit that T.P. Property or Penntech is bound by the contracts.

Obviously a finding of majority status must be established before the duty to bargain in respect to the effects of closing Kennebec mill will attach. As in the *Heyman* case, *supra,* if there be no contract, the duty to bargain cannot be established. As to Kennebec there is no difficulty in charging it with the duty to bargain for Kennebec executed the contract. On the other hand Penntech and T.P. Property were not signatories to the contract and as found by the District Court were discrete corporations and not bound by the contract. Thus, as in *Heyman,* there are no grounds for holding them to a duty to bargain with the Unions for a presumption of majority did not obtain in the absence of a valid and subsisting contract binding them. As to Penntech and T.P. Property, there was no contract. Accordingly, if *Heyman* is applied, T.P. Property and Penntech must be dismissed from this action.

On the other side of the coin it has been held that certain Agency action is binding on the courts. In *United States* v. *Utah Construction & Mining Company,* 384 U.S. 394, 422 (1966), the Court said: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."

In *Tipler* v. *E. I. DuPont,* 443 F.2d 125, 128 (6th Cir. 1971), the court said, "It is now accepted that both res judicata and collateral esoppel can be applicable to decisions of administrative agencies acting in judicial capacity."

In *Painters District Council No. 38, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-*

CIO v. *Edgewood Contracting Company*, 416 F.2d 1081, 1084 (5th Cir. 1969) the court opined:

> The policy considerations which underlie res judicata—finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense—are as relevant to the administrative process as to the judicial. *Old Dutch Farms, Inc.* v. *Milk Drivers and Dairy Employees Local Union No. 584*, 281 F. Supp. 971, 974 (E.D.N.Y. 1968). Nor is there any difference in the underlying principles because the administrative decision is sought to be given effect in a judicial proceeding.

In this case the Court found that the National Labor Relations Board's determination that a local union was guilty of secondary boycott was *res judicata* on the question of liability in a subsequent damage suit brought under Section 303 of the Labor Management Relations Act, as amended. Cf. *United Brick & Clay Workers of America* v. *Deena Artware, Inc.*, 198 F.2d 637 (6th Cir. 1952).

The foregoing cases, although they may point the direction, do not answer whether a determination by a court of competent jurisdiction may constitute *res judicata* in a proceeding before the National Labor Relations Board. This is the question which is before me. Although *Heyman* would seem to impose an affirmative answer and command the dismissal of Penntech and T.P. Property from these proceedings, I am bound by the Board's ruling in *Walter E. Heyman d/b/a Stanwood Thriftmart*, 216 NLRB 852 (1975), since such case seems to be the applicable law to which I must adhere. *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 772-773 (1957). ". . . [No] inference can be drawn that the Board has accepted an adverse court decision from the mere failure to petition for certiorari in the case." *Novak Logging Company*, 119 NLRB 1573, 1575,

1576 (1958). Thus the Respondents' arguments are misdirected to me and must be overruled.

VII. The Respondents' Claim That Section 10(b) of the Act Bars Charging Parties From Seeking Any Remedy Against Penntech and T.P. Property

The Respondents contend that Section 10(b) of the Act is applicable because Penntech and T.P. Property were not named in or served with the amended charge until November 7, 1977, 7 months after the alleged refusal to bargain. This argument is without merit since it has been found that Kennebec, T.P. Property, and Penntech constitute a single employer. *Key Coal Company*, 240 NLRB 1013 (1979); *Royal Typewriter Company, etc.* v. *N.L.R.B.*, 533 F.2d 1031, 1041-44.

Conclusions of Law

1. The Respondents are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. The Respondents constitute a single employer within the meaning of the Act.

3. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

4. (a) All boss machine tenders, machine tenders, back tenders, third hand, fourth hand, fifth hand and beater engineers employed by Respondents at the Madison, Maine, location excluding guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) All head firemen and oilers employed by the Respondents at the Madison, Maine, location excluding guards

and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(c) All head machinists, millwright and electricians and all journeymen machinists, millwright, piper, mason, blacksmith, painter, electrician welder, tinsmith, roll grinder, knife grinder, bolt men and helpers employed by the Respondents at their Madison, Maine, location excluding guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[26]

5. At all times material herein the above-named labor organizations have been and now are the exclusive representatives of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By failing and refusing to bargain collectively in good faith with the above-named labor organizations in respect to the closing of the Kennebec mill on March 29, 1977, and as to the effects of said closedown, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondents have engaged in certain unfair labor practices, it is recommended that they cease and desist therefrom and take certain affirmative

26. The Respondents have admitted that the foregoing units are appropriate for the purpose of collective bargaining.

action designed to effectuate the policies of the Act. The remedy pronounced by the Board in the case of *The Ohio Brake & Clutch Corporation*, 244 NLRB No. 5 (1979), is adopted as the appropriate remedy in this case.

Accordingly, to effectuate the purposes of the Act, I will provide a bargaining order with a backpay requirement designed to make whole the employees for losses suffered as a result of the violation, in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[27] Thus, the Respondents shall pay their displaced employees backpay at the rate of their normal wages when last in the Respondents' employ from on or about March 29, 1977, the date that the Respondents closed the Madison, Maine, facility and terminated the employees until the occurrence of the earliest of the following conditions: (1) the date that the Respondents bargain to agreement with the Unions on those subjects pertaining to the decision to close the Madison facility and the effects of the closing on unit employees; (2) the parties reach a bona fide impasse in bargaining; (3) the failure of the Unions to request bargaining within 5 days of issuance of this Decision and Order or to commence negotiations within 5 days of the Respondents' notice of their desire to bargain with the Union; or (4) the subsequent failure of the Unions to bargain in good faith.

Additionally, the Charging Parties request a make-whole remedy which compensates employees for losses involving severance pay, vacation pay, insurance benefits and premiums, and pensions, all such losses resulting from the Respondents' failure and refusal to honor the labor agreement. The uncontroverted evidence in this case establishes that the Respondents by refusing to abide by the terms of the labor agreement have altered its terms in violation of

27. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Section 8(d) of the Act. It is well established that "[a]n employer cannot alter mandatory contractual terms during the effective period of the agreement without the consent of the union." *Los Angeles Marine Hardware Co.* v. *N.L.R.B.*, 602 F.2d 1302, 1307 (9th Cir. 1979). Such a repudiation of the contract as here amounts to a violation of Section 8(d) and Section 8(a)(1) and 8(a)(5) of the Act. *Ibid.* Thus, it is recommended that the Respondents, as a part of the remedy herein, and because of their flagrant disregard of their employees' rights protected by the Act and their unwarranted refusal to conform with the plain commands of the Act, be required to comply with those provisions of the labor agreement which concern severance pay, vacation pay, insurance benefits and premiums, and pensions. See also *The Nestle Company, Inc.*, 251 NLRB No. 142 (1980).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[28]

The Respondents, Penntech Papers, Inc.; T.P. Property Corporation and Kennebec River Pulp and Paper Company, Madison, Maine, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with the Unions as the exclusive collective-bargaining representatives of all

28. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

employees in the appropriate units described below, concerning the closing of and the effects on said employees of its decision to terminate business operations at the Kennebec mill in Madison, Maine, on March 29, 1977. The appropriate bargaining units are:

> All boss machine tenders, machine tenders, back tenders, third hand, fourth hand, fifth hand and beater engineers employed by Respondents at the Madison, Maine, location excluding guards and supervisors as defined in the Act.
>
> All head firemen and waste firemen and oilers employed by the Respondents at the Madison, Maine, location excluding guards and supervisors as defined in the Act.
>
> All head machinists, millwright and electricians and all journeymen machinists, millwright, piper, mason, blacksmith, painter, electrician welder, tinsmith, roll grinder, knife grinder, bolt men and helpers employed by the Respondents at their Madison, Maine, location excluding guards and supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Recognize and bargain collectively with the above-named labor organizations as exclusive representatives of the aforesaid employees, with respect to those subjects pertaining to the decision to close the Kennebec mill and the effects of the closing on unit employees and reduce to writing any agreement reached as a result of such bargaining.

(b) Make whole production and maintenance employees employed by the Respondents at the Madison, Maine, facility in the above-described appropriate units by paying them their normal wages for the period set forth in this recommended Order and otherwise comply with the remedy herein.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the attached notice marked "Appendix"[29] to the Unions herein and to all production and maintenance employees employed by the Respondents in the above-described appropriate units at the Madison, Maine, facility. Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by its authorized representative, shall be mailed immediately upon receipt thereof, as herein directed.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. January 21, 1981

/s/ LOWELL GOERLICH

Lowell Goerlich,
Administrative Law Judge

29. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT fail and refuse to bargain with United Papermakers International Union, Locals 36 and 73; International Brotherhood of Firemen & Oilers Local 270; and International Brotherhood of Machinists and Aerospace Workers, Local 559, AFL-CIO, as the exclusive representatives of our employees in the appropriate units described below with respect to those subjects pertaining to our decision to close our Madison Mill and the effects of the closing on unit employees. The appropriate units are:

All boss machine tenders, machine tenders, back tenders, third hand, fourth hand, fifth hand and beater engineers employed by the Respondents at the Madison, Maine, location excluding guards and supervisors as defined in the Act.

All head firemen and waste firemen and oilers employed by the Respondents at the Madison, Maine, location excluding guards and supervisors as defined in the Act.

All head machinists, millwright and electricians and all journeymen machinists, millwright, piper, mason, blacksmith, painter, electrician welder, tinsmith, roll grinder, knife grinder, bolt men and

helpers employed by the Respondents at their Madison, Maine, location excluding guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain collectively with the above-named Union with respect to those subjects pertaining to the decision to close our Madison, Maine, mill and the effects of the closing on unit employees and WE WILL reduce to writing any agreement reached as a result of such bargaining.

WE WILL make whole all production employees employed in the above-described appropriate units at our Madison, Maine, mill for any loss of pay they may have suffered as a result of our failure to bargain about those subjects pertaining to our decision to close our Madison, Maine, mill and the effects of the closing on unit employees for the period decided by the National Labor Board and comply with those provisions of our labor agreement which concern severance pay, insurance benefits and premiums, and pensions.

PENNTECH PAPERS, INC.;
T.P. PROPERTY CORPORATION
AND KENNEBEC RIVER PULP
AND PAPER COMPANY

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

No. 83-125

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENNTECH PAPERS, INC. AND T.P. PROPERTY CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether a finding in a proceeding under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, that parent corporations were not bound by a collective bargaining agreement (to which they were not signatories) between their subsidiary corporation and several unions precluded the Board from finding that the parent corporations violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the unions about the effects of the corporations' decision to close the subsidiary's plant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 706 F.2d 18. The decision and order of the National Labor Relations Board (Pet. App. 20a-97a) are reported at 263 N.L.R.B. No. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on April 26, 1983. The petition for a writ of certiorari was filed on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, are set forth at pages 2-3 of the petition.

STATEMENT

1. Petitioner Penntech Papers, Inc. (Penntech) operates a paper mill in Johnsonburg, Pennsylvania. In 1975, Penntech organized petitioner T.P. Property Corporation (T.P.) for the purpose of acquiring property for Penntech. T.P. has no existence apart from Penntech, all of its officers being Penntech's officers, and its headquarters being Penntech's headquarters. Pet. App. 3a, 73a-74a; A. 144-146.[1]

Kennebec River Pulp and Paper Company (Kennebec) operated a paper mill in Madison, Maine, which it closed in December 1975. Shortly thereafter, petitioners entered into negotiations to purchase Kennebec. As a condition precedent to the purchase—which was intended to revive the mill—petitioners required Kennebec to negotiate certain changes in the collective bargaining agreement it had with several unions.[2] The revised collective bargaining agreement between Kennebec and the Unions was executed on March 1, 1976. Pet. App. 3a-4a, 43a-44a, 77a-79a; A. 147-148, 150-154, 466-472, 592-593, 656-660, 671-672, 756-759.

On March 3, 1976, T.P. formally acquired all of Kennebec's stock and made monetary advances to Kennebec for which Kennebec executed demand notes secured by Kennebec property. Upon the acquisition, petitioners' president and director, John Leslie, and petitioners' vice president, William Ford, were named two of Kennebec's three directors; within a year, Leslie and Ford were Kennebec's only directors. Kennebec's new officers included Allen Nadeau, a Penntech vice president, as president; Ford as vice president; and Steven Bittel, Penntech controller, as corporate

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[1] "A." refers to the joint appendix in the court of appeals.

[2] United Paperworkers International Union, Locals 36 and 73, International Brotherhood of Firemen & Oilers, Local 270, and International Brotherhood of Machinists & Aerospace Workers, Local 559, AFL-CIO.

controller. Pet. App. 3a-4a, 43a-44a, 74a-75a; A. 145-147, 153, 401, 862-864.

Kennebec resumed operations under its new ownership and management within a few weeks. Thereafter, all sales of Kennebec's products were made through Penntech; all customer orders were taken by Penntech; and final authority for the scheduling of production was vested in Penntech's personnel at Johnsonburg. Similarly, Penntech did all of Kennebec's purchasing and paid Kennebec's suppliers directly. Penntech financed the on-going operations at Kennebec; and Kennebec's top officials were all on Penntech's payroll and were responsible to, and subject to hire and fire by, petitioners' president, Leslie. Pet. App. 4a, 44a, 77a-78a, 80a-83a; A. 424, 704-713, 724-725, 765, 868-872, 882-884, 887, 895, 965-968, 974.

Leslie himself, while holding no formal executive position with Kennebec, followed its affairs "very closely" and was actively involved in its operations. On November 19, 1976, he convened a meeting of Kennebec department heads and union representatives and warned them that production would have to increase or the mill would not be "viable for continued operation." Pet. App. 4a, 47a-48a, 75a-76a; A. 660-661.

Production at Kennebec remained poor in January and February of 1977, and petitioners' top-level management was aware that closure was probable. On March 17, 1977, Leslie, as president of T.P., sent a letter to Kennebec noting that T.P. had demanded that Kennebec pay T.P. outstanding debts of $2,500,000 and demanding that the notes be paid immediately. Everyone in management was aware that Kennebec could not make such payment, and that the demand was a predicate to protecting T.P.'s lien interest upon closure. On March 29, 1977, Leslie ordered Kennebec's president—at that time, Bruce St. Ledger, who was on Penntech's payroll—to close the mill that day. St. Ledger

did so, and the next day petitioners began removing materials and equipment from the mill. Pet. App. 4a-5a, 17a, 48a-53a, 63a; A. 375-376, 536-537, 879-880, 940-947.

Although the closure was final and not temporary, St. Ledger—after consultation with Leslie—insisted to union representatives who were inquiring about, for example, severance pay, that the shutdown was "indefinite" and not permanent. He advised them that any further questions should be directed to Penntech's attorneys. Subsequent meetings between St. Ledger and the union representatives produced no results, but only reiteration by St. Ledger that Kennebec had not closed permanently. In fact, Kennebec's creditors foreclosed, and Kennebec never again operated the mill. Pet. App. 5a, 18a, 53a-58a, 61a-63a; A. 317-318, 448-452, 454-458, 500-502, 521-522, 574-576, 651, 1024-1025.

Respondent Unions filed suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, seeking to compel petitioners to arbitrate the provisions of the Unions' collective bargaining agreement with Kennebec governing vacations, pensions and severance pay in the event of a permanent closure. The district court, affirmed by the court of appeals, held that petitioners, who were not signatories to the agreement, could not be compelled to arbitrate since there was "no allegation or evidence that any fraud or misrepresentation by [petitioners] induced the [Unions] to enter into the collective bargaining agreement" and since "the parties relied on the corporate entities as they existed at the signing of the contract." *United Paperworkers* v. *Penntech Papers*, 439 F. Supp. 610, 621 (D. Me. 1977), aff'd *sub nom. United Paperworkers* v. *T.P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978).

2. The Union also filed unfair labor practice charges with the Board, alleging that petitioners and Kennebec had violated their obligation to bargain over the effects of the decision to close the Kennebec mill. The Board, affirming the administrative law judge, found that petitioners and Kennebec constituted a single employer of the Madison, Maine, mill workers, and that they had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain over the effects of the mill closure. Pet. App. 22a-24a, 73a-83a. In concluding that petitioners and Kennebec constituted a single employer, the Board relied (*id.* at 83a) on their "common management," "centralized control of labor relations," "[c]ommon ownership and interrelation of operations."

The Board rejected petitioners' contention that principles of res judicata or collateral estoppel based on the Unions' prior Section 301 suit precluded a single employer finding. Pet. App. 22a-23a. The Board explained (*ibid.*; footnote omitted):

> In [the prior] suit, under Section 301 of the Labor Management Relations Act, the district court applied Federal common law and held that the separate corporate existence of Penntech and T.P. Property would not be ignored in order to compel them to join Kennebec in the arbitration of a dispute under a bargaining agreement to which they were not signatories. In affirming this holding, the circuit court stated:
>
> > We also agree that the real issue in this case is * * * whether parent corporations should be bound to the collective-bargaining agreements of their subsidiaries. * * *
>
> However, the present proceeding * * * is not controlled by Federal common law and the issue is not the enforceability of the provisions of a specific bargaining

agreement. On the contrary, the Board's test is, as stated with approval by the Supreme Court in *Radio & Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965):

> [I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise * * *. The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

An examination of these criteria was not the basis for the holdings in the aforementioned court proceedings. Accordingly, due to the lack of identity in either the cause of action or the respective issues involved, it is manifest that the principles of *res judicata* and collateral estoppel do not apply.

Accordingly, the Board ordered petitioners, *inter alia*, to bargain with the Unions about the effects of the decision to close the Kennebec mill. Pet. App. 31a.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-19a. The court agreed with the Board that the doctrine of collateral estoppel did not preclude the Board's single employer finding because the issues whether companies constitute a single employer for the purpose of imposing a bargaining obligation under Section 8(a)(5) of the Act and whether a signatory company is the alter ego of a nonsignatory company, so that the latter is bound by the collective bargaining agreement of the former in a Section 301 proceeding, are "conceptually distinct" and turn on different facts. Pet. App. 10a-11a. The

court also noted (*id.* at 11a n.3; emphasis added) that in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 286 (1972), this Court had "distinguished between the *statutory* obligation to bargain with the union under Section 8(d) of the Act and the *contractual* obligations normally enforced through an action to compel arbitration under Section 301, emphasizing that the latter obligations arose as a result of the mutual agreement of the parties."

On the merits, the court concluded (Pet. App. 15a, 18a) that the Board's findings both that "Penntech and its wholly-owned subsidiaries, T.P. and Kennebec, constitute a single employer within the meaning of section 2(2) of the Act," 29 U.S.C. 152(2), and that the employer had violated its duty to bargain about the effects of the decision to close the Kennebec plant were "supported by substantial evidence."

ARGUMENT

Petitioners no longer phrase their argument in terms of collateral estoppel, but rather contend (Pet. 8) that "a parent corporation has [no] duty to bargain with the employees of its wholly-owned subsidiary over issues it is not obligated to arbitrate." Petitioners' claim that its duty to bargain under the Act must be coextensive with its duty to arbitrate determined in a Section 301 proceeding, however, founders for the same reason that its collateral estoppel argument failed: the issues involved in the two proceedings are significantly different.

This Court has made clear that whether a party has a duty to bargain under the Act is a separate and distinct question from whether it is obligated to honor the terms of a collective agreement. For example, in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 188 (1971) (footnote omitted), the Court held that "[t]he remedy for a unilateral mid-term modification of a permissive term [of a collective bargaining agreement] lies in an action for breach

of contract, * * * not in an unfair-labor-practice proceeding." In so ruling, the Court explained that Congress had rejected provisions that would have made contract violations an unfair labor practice on the ground that " '[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.* at 186-187, quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947). Similarly, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281-282 (1972), the Court held that "[i]t does not follow * * * from [a successor employer's] duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the predecessor] and to which [the successor] had in no way agreed." The Court pointed out (*id.* at 287) that the contractual issue turns on whether the successor "had agreed or must be held to have agreed to honor [the] collective-bargaining contract," while the obligation to bargain under the Act is not based on the consent of the parties. Most recently, in *Jim McNeff, Inc.* v. *Todd*, No. 81-2150 (Apr. 27, 1983), the Court upheld the right of a union to enforce, by way of a Section 301 suit, monetary obligations incurred by an employer under a prehire agreement in the absence of proof that the union represented a majority of the employees, notwithstanding the fact that an employer has no obligation (indeed, no right) under the Act to bargain with a minority union. The existence of a contractual duty thus does not necessarily give rise to a statutory obligation, nor does a violation of the Act necessarily constitute a breach of contract.[3]

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[3]Petitioners' reliance (Pet. 11) on *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), is misplaced. In *Burns, supra*, 406 U.S. at 286-287, the Court held *Wiley* inapposite to the determination whether an obligation to honor a pre-existing collective bargaining agreement was encompassed in the statutory obligation to bargain on the ground

Accordingly, petitioners' assertion (Pet. 11) that "there is no policy justification for imposing on parent corporations different obligations depending on whether an action is brought pursuant to Section 8(a)(1) and (5) as opposed to Section 301" is unfounded. The justification plainly arises from the fact that the obligations imposed by Section 8(a)(5) are distinct from those that flow from contractual agreements.[4]

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that, by contrast to *Wiley, Burns* "does not involve a § 301 suit; nor does it involve the duty to arbitrate." 406 U.S. at 286.

DelCostello v. *Teamsters*, No. 81-2386 (June 8, 1983) (Pet. 12), also is irrelevant to the question presented here, since that case involved the entirely different question of what statute of limitations should apply to a "hybrid" suit by an employee alleging that his employer had breached the collective bargaining agreement and that his union had breached its duty fairly to represent him by mishandling the ensuing grievance arbitration proceedings. Moreover, to whatever extent the " 'similarity of rights' asserted in Section 301 suits and unfair labor practice actions" (Pet. 12, quoting *DelCostello, supra*, slip op. 18) may have contributed in *DelCostello* to the Court's "borrowing" the six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), that factor alone cannot require a no alter ego finding in the Section 301 context to preclude a single employer finding in a subsequent Section 8(a)(5) proceeding. In any event, "straightforward" Section 301 suits against the employer for breach of the collective bargaining agreement brought by the union itself rather than by an individual employee are governed by the applicable state statute of limitations, not by 29 U.S.C. 160(b). See *DelCostello, supra*, slip op. 10; *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

[4]Petitioners' assertion (Pet. 10) that enforcement of the Board's order allows the Unions to "obtain the same result" they unsuccessfully sought in the prior Section 301 suit is incorrect. In the prior action, the Unions attempted to compel petitioners to participate in an arbitration proceeding arising from Kennebec's failure to fulfill a panoply of obligations imposed by the collective bargaining agreement in the event of permanent closure. Specifically, the Unions sought to compel pension fund payments and "termination benefits arising from the agreement." *United Paperworkers* v. *Penntech Papers, Inc., supra*, 439 F. Supp. at

Carpenters Local No. 1846 v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982) (Pet. 12), is not to the contrary. Indeed, the court there emphasized (690 F.2d at 508-509) the different criteria underlying the alter ego and single employer theories. Hence, that decision provides no support for petitioners' position that the finding in the Section 301 context that Kennebec was not the alter ego of petitioners—upheld by the same court of appeals that upheld the Board's order here—precluded the conclusion in a subsequent unfair labor practice proceeding that petitioners and Kennebec were a single employer.[5]

Petitioners' additional contention (Pet. 9) that it is improper for the Board to base single-employer status on a parent-subsidiary relationship misconceives the test applied by the Board. The Board's conclusion that petitioners and Kennebec were a single employer was not grounded on the mere fact that Kennebec was a subsidiary of petitioners. Rather, the Board relied on the existence of facts that showed that petitioners and Kennebec enjoyed "common management," "a centralized control of labor relations," "common ownership and interrelation of operations." Pet. App. 23a, 83a. This Court approved the use of these criteria

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615. By contrast, the Board's order simply requires petitioners to negotiate over the effects of closure; no particular subject matter for the negotiations is dictated. Pet. App. 26a, 92a-93a.

[5]In *Florida Marble Polishers Health & Welfare Trust Fund* v. *Edwin M. Green, Inc.*, 653 F.2d 972, 975 (1981) (Pet. 12-13), the Fifth Circuit, citing the test approved in *Radio & Television Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), simply upheld the district court's factual determination that two separate corporations did not constitute a single employer where the two entities operated independently of each other. Similarly, in *Tishman Corp.* v. *Elevator Constructors*, 92 L.R.R.M. 2705, 2708 (S.D.N.Y. 1976) (Pet. 13), the district court found that the parent corporation and its subsidiary were not "so interrelated as to constitute a single employer."

in determining single-employer status in *Radio & Television Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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[6]Petitioners assert (Pet. 8 n.*) that the Board's finding of a single employer, which was upheld by the court of appeals, is not supported by substantial evidence. That purely evidentiary issue, however, does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as the Statement (pages 2-4, *supra*) makes clear, the Board's conclusion is amply supported by the evidence.

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